IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

LOCAL 17 INTERNATIONAL ASSOC. OF BRIDGE & IRON WORKERS INS. FUND,

Plaintiff,

vs.

PHILIP MORRIS, INC, ET AL,

Defendants.

Civil Action No. 1:97CV1422
Akron Ohio

VOLUME 16

TRANSCRIPT OF PROCEEDINGS HAD BEFORE
THE HONORABLE JAMES S. GWIN,
UNITED STATES DISTRICT JUDGE,
ON TUESDAY, MARCH 16, 1999, AT 8:00 A.M.

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occurred after January 1st of '86.

With that correction to the instructions, the parties are now afforded an opportunity to make final arguments to you. And I would at this time call upon the plaintiffs to begin.

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CLOSING ARGUMENT ON BEHALF OF THE PLAINTIFF

MR. COUGHLIN: Good morning ladies and gentlemen. It seems like we have been here a long time, together, but it's only been about three weeks. However, in that time, in that three week time period, 20,000 people, 20,000 individuals in the United States have died of smoking-related diseases; 120,000 children have taken their first cigarette; 60,000 children in this country in that time period have become regular smokers, and one-third will die a premature death.

And it's in part because of the situation we have gotten ourselves in. It started back in 1953 and there was a fork in the road and the defendants made a choice and they went down the wrong road. They went down the road that insured them their profits for the years, insured them their jobs, and their corporations at a time, in their own words, you saw that one document, this the way it ends, with a whimper instead of a bang.

They chose the wrong road at that time. And

this is where we find ourselves today as we deal with this problem in this country.

And I had said I was going to prove four things. I said I was going to prove that they concealed information, they concealed evidence; I said I was going to prove that they suppressed the development of a safer cigarette; that they denied causation, they still do it today; they denied addiction, they still do it today.

The only person who didn't was Dr. Rubin. He came in and he -- does he teach his medical students it is not a cause? He said no, he taught his medical students -- they make a distinction on the stand

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scientific versus lay people. They say hey, they are not scientist, they don't believe it doesn't cause disease, but even we know the medical students know smoking causes disease.

I said I was also going to prove they manipulated nicotine with pH. And I think we have shown that.

And finally, I said they targeted children, and you can see they all did that.

And the impact of these four components, the impact on the decision making process about smoking and health in this country was from top to bottom from the Surgeon General, where we saw the people from the Surgeon

General's office come in here, Ron Davis, Dr. Harris, Dr. Pierce, the people that actually worked on these reports, came in here and talked about the impact of these types of activities on them. All the way down to our children, who even these guys admit are too immature, not old enough to make an informed decision about the significant risk that occur when you take up smoking.

I want to talk a second about responsibility. The defendants always want to say, and with some reason, the smokers should take some responsibility. That's right, they should. We have never said they shouldn't.

And they want to say the government should take some responsibility. The government didn't do this or the government didn't do that. That's right.

But you know what the defendants never wanted to do? They never want to take responsibility. They never do. Do they come in and say, hey, it's a cause, it's addictive, let's warn people, let's get the message out?

No. They embarked on a campaign saying just the opposite. You know what happens? What happens when you get to proving that it is a cause, that it is addictive, that they knew all about nicotine; what do they do? What do they do then? Then they come in and say everybody knew, everybody knew, it was common knowledge.

Let's go back to King James. Hey, let's bring it up into this century, the little white slaves. They said about what Mark Twain was saying. And those other people, everybody knew it caused disease and it was addictive.

Well, if everybody knew, how come the heads of the corporations, some of the biggest corporations in this country, went in 1994, raised their hand in front of Congress, and that's Exhibit 3772-A, and said it's not addictive? Why did they say that?

Why? Because it was the last leg, it was the end, it was the crumbling of what had gone on for more than 40, 45 years, and it started in 1953.

Now, this case charges a corrupt -- a pattern of corrupt activity as well as a conspiracy. And it operated through an enterprise. There is only one way, there is only one way this kind of thing could have worked for all those years, and that was to have a shield, a shield between them and the outside world. And that shield, that protection was the CTR, the Council for Tobacco Research.

Remember, it originally started off as the TIRC, and then it became the CTR. And what you had there,

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there it broke off, part of that broke off when it was the TIRC and became the TI the Tobacco Institute.

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The Tobacco Institute became the spokesperson. They were the ones issuing statements all the way out through the years, literally, hundreds of statements throughout the years.

And you will have some evidence that some on this board, throughout the years, believed that smoking didn't cause disease, and that the people that say smoking is addictive defies common sense.

I guess they are talking about the Surgeon General of the United States. Let's see how they operated this and what happened. This is going to look like a flying saucer, or at least I thought it did when I started out on it.

But here is what happened in this case. We had the TIRC, and the CTR at the hub with Hill & Knowlton and TI. And around this hub we had RJRT, Philip Morris, American, B&W, BATCo, and Lorillard.

At different times we had somebody else in this picture, and that somebody else that came into this picture at different times was Liggett. And they came in and out of this picture.

And what happened is, these companies made these entities, TIRC and CTR, their spokespersons. And by saying that they were conducting a research, the research that they were supposed to conduct because they were

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manufactures of this product, by saying they were conducting that research through these entities and having this other entity, TI, issue statements throughout the years denying causation and keeping back the hordes, so to speak, they were able to operate; and operate and sell billions and billions of conventional cigarettes throughout the years; and they monopolized the market here in the United States.

And how did they do that? Well, they did it with mailings. And that's what the mail fraud that you are going to be asked to do; they did it with wires, the press release, the televisions, the phones, anything they did in their business, they were using wires all the time. The mailings, hundreds of mailings, hundreds and hundreds of mailings with the ads and magazines that were mailed throughout the country and things like that, throughout the years.

Tampering and obstruction of justice. Those are the other two predicate acts. Those are the four predicate acts that we have to prove, we have to prove to carry out this scheme.

They did it by four ways; that they used the mails, or they used the wires. We don't have to prove all four, but we have to prove a combination of the four. They obstructed justice. In other words, they kept or

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concealed to assist another, to keep going in a crime or they tampered with evidence.

And we saw what they did. We saw them keeping stuff when there was an official proceeding, they knew the Surgeon General was going to be coming out with reports every year. And what did they do? They concealed evidence from him or her during the time period, they destroyed documents, they destroyed research, they sent it

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overseas, they hid it. That's how they carried out this scheme so that nothing would be in their files.

And they reached an agreement, it was called a gentlemen's agreement. It's a stunning name, it's their words, not ours. They called it the gentlemen's agreement. And that agreement had two components:

The first was that it basically suppressed the development of safer cigarettes, because you would have to have shared that with everybody else. So nobody would put in the R and D, Research and Development, to do that.

And the second, they agreed, these companies, these giants in the United States agreed, no in-house biological research in this country. And you heard Dr.Farone come in and testify about that. That he was told about the gentlemen's agreement from Dr. Osdene and others at that company.

But more importantly, what you saw is you saw

the documents. Because an agreement this size could not go unmentioned for all these years. It wasn't mentioned at the original meetings in the 1950s, at least we saw no documents from the companies talking about that agreement. It's only later that it surfaced in documents.

And let me just talk about these mailings because these are important as you go back to those predicate acts.

You heard the Liggett President, Ben LeBow talk about him coming in and using the mails and sending cigarettes through the mails and things like that. And that was at a time when Liggett was a part of this conspiracy. And you heard about the different company's promotional items they sent through the mails. All those things constitute mail use in furtherance of the scheme.

And then we have the wires, which we already talked about the use of the phones, the press releases that go over the wires, some of which are on that board.

And I talked about the tampering. You have to do it in conjunction with an official proceeding. I think that we proved every year the Surgeon General was going to come up, and these people knew it, they wrote about it and they were concerned about it and they did things in it. You saw that telex come over where they were actually holding back that information as it dealt with heart

disease.

And finally, the obstruction of justice; and that's the concealment. And I'm going to read you some of the documents and go through some of the evidence that we believe supports that obstructing of justice charge.

Now, how do we know this happened?

Well, we saw a lot of documents, I've been talking about it and we had Dr. Jaffe come in.

And what did he say? He said, well, that's a pretty big -- he was the first guy, the red-headed guy. He goes, that's a pretty big deal. How can you conspire to control a whole market in the United States? That's a pretty big, tall order. And he talked about it. He said, well, I defined the U.S. market because that's where U.S. customers get their cigarettes from.

And that market was so concentrated, we saw that there were only six firms, that there were six main firms in the 1950s, and there are still a limited number of firms. One of them had gone out of business. There

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were still a limited number of firms that literally controlled a hundred percent of the cigarette market in the United States.

First, you need to find the market, and then he wanted to see if it was possible; and he said it was possible. Because the other thing that came in about that

market was that there were significant barriers to entry because they so controlled that market, and to get a new entry for a cigarette, to advertise a brand is such a tremendous task in this country, they were able to do that.

And finally, he talked about -- the third thing he talked about was the motivation. Did they have motivation?

Well, they sure did. Because in the 1950s, the first scientifically accepted evidence by the medical community in general came out. And that was what they termed internally as the health scare. And they said, and that drove them together in 1953.

And let's see what happened in 1953. We looked at some documents from Hill & Knowlton. And we know that in 1953 these gentlemen, the heads of these biggest corporations in the United States, they got together for three meetings. They got together December 10th through 11th, December 14, 15 and December 28th. And they got together.

And if we could take a look at exhibit, I believe it's 59. This is Exhibit 59, a memo from those early meetings. And if we could take a look and see the document. These are the people that got together to form the committee. And here it talks about the meeting on

December 10th and 11, 1953. And it talks about Cullman, who later went to Philip Morris. Talks about Darr from J. R. Reynolds, Liggett Meyers is there at the first meeting, Lorillard, Brown & Williamson, Tobacco Associates and Philip Morris, and the United States Tobacco Company, mainly known for their chewing tobacco today. And they gathered for all these meetings.

And the defendants say, well, these are Hill & Knowlton documents, talking about these meetings as these people get together. And so anything they said bad, anything they say about forming a public relations vehicle, well, you know, you just -- that's just a public relations firm that was talking about them.

Well, there are two things wrong with that. One, they are a public relations firms. They should not have been setting up a public relations firm, the TIRC, when in fact they knew the statement said that it was supposed to be an independent scientific research firm. They refer to it as a public relations committee.

And number 2, if there was nothing wrong with these meetings, they say, oh, these are Hill & Knowlton documents. If there were nothing wrong with these meetings, where are these other documents? Where are the documents from the defendants? These are the CEOs of these companies going to New York, meeting together three

times in one month in 1953.

Where are those documents just jotting down they got to together, talked about this. We are going to solve this problem. You don't see them. You don't see

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those documents. And why don't you see those documents?
You don't see those documents because the agreement that they made in that hotel was an illegal agreement. And it was called the gentlemen's agreement. And that's what the formation of this whole conspiracy started with, is those meetings early on. It changed shapes over the years. People moved in and out a little. The core remained the same.
And the idea was that we can't disrupt the status quo. We cannot break the bubble that we have here, because if we do, the chances are we could be out of business. The risks were too great.
So this acted like a barrier around these companies as they perpetrated these crimes, kept out the Surgeon General, Congress, FDA, the funds that are here today, the smokers, all of them received the information that the central core group was putting out. So let's take a look at what that information was and why it violated -- why it violates the law.
In 1954, January 4th, these companies issued the frank statement. There couldn't be two bigger, I

guess, misnomers than the gentlemen's agreement which was anything but a gentlemen's agreement, and here, the frank statement. This was anything but frank.
When they said that paramount in their concerns was people's health, and that they would set up a committee to research all aspects of smoking and health, all aspects, and that that committee would be independent, not just the Scientific Advisory Board, but that the committee that they set up would be independent, and that's what they promised in 1954.
And what happened? That didn't happen. If we could take a look at the two promises.
We accept an interest in people's health as a basic responsibility paramount to every other consideration of our business.
That's what they told the American public. They said we would, we always have and always will cooperate closely with those whose task it is to safeguard the public health. That was the Surgeon General office and people like that.
And you heard those people come in. They were the head of that for over four, five years. And they came in here and they got anything but cooperation, and that they were pledging aide and assistance to the research effort into all phases of tobacco use and health.

And the next page.
And here is the promise they made, they promised to set up this Tobacco Industry Research Committee, that's the TIRC, okay? And in charge of it they were going to put the Scientific Advisory Board that was going to be completely independent.
Now, let's take a look at what we know they actually did. There is no documents from that time period that we were able to find documenting this agreement, documenting that they had entered into this gentlemen's agreement.
There is all the stuff from Hill & Knowlton talking about what they intended to do, which was just opposite of this essentially frank statement.
Where do we have to go for the documents?

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Years later after this agreement goes on, and it's in force, we see documents from several of the companies, referring to -- if we could take a look at Exhibit 2519.

This is a March, 1983 document, from RJRT from two of the top scientists there, Rodgman and Colby.

And if we flip into it, it's talking about Philip Morris, this document, and here, right in the middle of one of their own documents it talks about, "throughout the domestic industry, two gentlemen's agreements were operative in the early days:

"Any company discovering an innovation permitting the fabrication of an essentially safe cigarette would share the discovery with others in the industry."

Let's take a look at that. Others termed it differently and phrased it differently. Essentially what this is, when you are talking about giants like this in the industry, is, hey, there is no incentive for you to do the R&D to indict our products, our conventional products, because you are going to have to share it.

What groups stayed out of this? Liggett. What did they do? They tried to research smoking and health at first, and they tried to develop a safer cigarette. Okay? They stayed out of it at first, but then they got back into it. That was the essence of this agreement.

Now, they say here, the defendants walk into this courtroom and say, at the time we told the Department of Justice that we would do this, that we would share the discovery with others in the industry.

Well, that sounds pretty good. It sounds like a pretty good idea. But the actual, what the actual impact is, is far different. And what they didn't tell the Department of Justice is that no domestic company would use intact animals in-house in biomedical research.

In other words, when they told the Department

of Justice, hey, we got together, now don't get mad at us, we got together and we are going to share any discoveries we make, okay?

That sounded great but they didn't tell them the other half of the deal, that they weren't going to do the research that would be necessary to make this come about. And we not only heard it from RJRT, we saw other documents like Wakeham's 1970 documents from Philip Morris talking about violations of the gentlemen's agreement that were going on at RJRT, and with whom. And we saw them throughout the years.

And who else? Did we have somebody come in and testify about it live?

We did. Dr. Farone came into this courtroom. You can take a look at his testimony, take a look at the top page. If you take a look at it here, it says here, did you think that was rather unusual that a company, Philip Morris, did animal testing outside the premises and particularly in Europe?

And he answered, yes.

Initially I asked Dr. Osdene why that was so.

And what did he say?

And he indicated that the reason for doing the testing in Germany, particularly, was they did not want the results of those tests to be available, if in fact the

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company was involved in litigation on safety and health.
That's just the opposite of what they promised in the frank statement. And did he give any reason? No, that was the reason.
All right. With respect to animal testing and INBIFO, what was your understanding? This is the place over in Europe. Well I just -- one of the things he said was that, I mean, first of all, it's a qualified laboratory, nobody questions that. Nobody questions that.
But second of all, that they had made a decision that they would do that.
And the other thing that was discussed several times with Dr. Osdene, these are the top people in this company; Seligman, Houserman, Dr. Helmut and Dr. Gash from the Swiss subsidiary, that there was an agreement among the tobacco companies -- they are talking about this in the 70's and 80's -- agreement among the tobacco companies they would not do animal testing of their own products or competitive cigarette products on the premises of each of the tobacco companies; they would only do it in one of two ways. One was, one way was to do it in Europe; and the other way was to do it through the CTR.
Well, the impact of those decisions that went to the top of these companies is what we have today, and it was a suppression of the development of the safer

cigarettes; it was a concealment of health information; and it was the concealment of what they knew about the addictive nature of nicotine.
That's what the result of this was, and that's the impact that it had on everybody in the United States.
Going into this thing, what did these companies know? Let's take a look at the next exhibit, 1953. This is a 1953, February, 1953 RJRT document by Claude Teague. This is before those December meetings. And he gathers together all the research.
Let's see what he concludes after gathering together. You heard Dr. Proctor talk. Dr. Proctor said this gathering together of this information was a significant piece of material. And had it been released, had it be released in public, it would have had a significant impact on the knowledge. Because knowledge, and going from one concept to another or one realization to another, is putting together all kinds of ideas. That's what the Surgeon General does every year.
And what did doctor -- what did Claude Teague conclude in 1953? These are his words, not ours. The increased incidence of cancer of the lung in man which has occurred during the last half century is probably due to new or increased contact with carcinogenic stimuli. The closely parallel increase in cigarette smoking has led to

the suspicion that tobacco smoking is an important etiologic factor in the incidence of primary cancer of the lung.
That's what he, that's after he gathered all that, that was the conclusion that he reached in 1953. Did they share that with the public, no?
Let's take a look at Exhibit 114, what Philip Morris knew in the mid-50's. This is a 1956 memo. The top people in this company here, and talking about this problem.
Confidential, it says at the top. Let's go to

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the highlight. Talks about a decrease in carbon monoxide indicates more complete combustion. They knew their problems in their cigarettes. They knew these polynuclear hydrocarbons were real problems. And they knew, down at the bottom, decreased irritation is desirable not only from the subjective viewpoint but also as a partial elimination of a potential cancer hazard.

That's what these companies are writing internally.

And when the CTR counterpart comes over to this country and visits, here is what they go back with. If we take a look at the 1958 trip report from TRC, the next document, Exhibit 161. This is a trip report where the TRC comes over and they visit all the companies, most of

the companies over here in the United States. And there is actually a list on the first page. And they visit the TIRC over in this country, and here is what they found out when they came over here.

Causation of lung cancer. With one exception, H.N.S. Greene, the individual whom we met believed that smoking causes lung cancer if by causation we mean any chain of events which leads finally to lung cancer and which involves smoking as an indispensable link.

Actually, what those companies knew in the early 50's, let's see what the company that went on its own, let's see what Liggett and Myers found out.

Exhibit 250. Liggett Meyers hired an outside agency, Arthur D. Little, who it was testified was a reputable agency. And here is what this agency concluded for Liggett and Myers: These are basically active materials present in cigarette tobacco, these are cancer causing, cancer promoting, poisonous, stimulating, pleasurable and flavorful.

I mean, look at that list; look at the list they have there. The lineup they have there.

This is all before the Surgeon General comes out in 1964. And let's see what the Surgeon General decided or said in 1964. This is the 1964 Surgeon General's report where the Surgeon General, for the first

time, concludes smoking causes lung cancer.

And let's take a look inside at that report. And if we take a look, it says, associations and causality. There has been a big deal made about just looking at the epidemiology associated here, but this inquiry, even back then, not only looked at that, but also took into account the clinical, pathological and experimental evidence to see if anything discredits the epidemiology back at that time in concluding smoking causes lung cancer.

What was the industry's reaction to this report? Did they accept it? Did they work closely with the health community as they said they would in 1954? No, they didn't. Let's see what they were saying publicly.

If we go to Exhibit 34, this is a 1953 document where Paul Hahn, the gentleman who called all the companies together, who was in charge of American Tobacco at the time, the top company in the concentration of all the companies, he thought it was time for a statement in November, 1953, just before those companies got together.

And let's see what his statement was to the American people: Mr. Hahn's statement was as follows:

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Believing, as we do that cigarette smoking is not injurious to health, I feel a statement of reassurance to the public should be made.

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Now there is a statement of reassurance to the public being made. They come out and acknowledge that they don't know, and yet in the frank statement they said the same thing. They said we don't believe that -- they say exactly this -- that there is no proof that cigarette smoking is one of the causes when they are talking about disease.

That's what they were saying. Let's see what they said, what the TIRC said in 1954, Exhibit 85.

This is for immediate release, this is one of those releases that goes over the wires. Tuesday October 12, 1954. If we could go down to the blow up, yes.

Both the smoking and non-smoking public should be reminded that no agent causing human lung cancer has been identified in tobacco, and that no clinical evidence has yet established tobacco as the cause of human cancer.

Well, that wasn't true. All the companies were on the board of directors of this TIRC, and they know internally in the companies they are identifying various components as carcinogenic, and they are taking a look at them, and some, around this time period, haven't been disclosed to the public.

Let's take a look at Exhibit 749.

This is from the Council for Tobacco Research; the name has changed, it's 1969 now, and this is from Dr.

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Clarence Cook Little. He was the scientific director of that organization.

This is, this is the scientific director. And then we have the SAB, the Scientific Advisory Board, which he interacts with.

This is 1969, four years after the Surgeon General's report.

The scientist who has been associated with more research in tobacco and health than any other person declared today that their is no demonstrated causal relationship between smoking and any disease.

The gaps in knowledge are so great that those who dogmatically assert otherwise, whether they state there is or is not is such a causal relationship, are premature in judgment. If anything, the pure biological evidence is pointing away from, not toward, the causal hypothesis.

That's what he's saying in 1969 when some of the CTR researchers as Dr. Rubin got up. We see this thing in 1962 pointed to women and an increase in cancer. And this is what the head of the CTR is saying to the public. And did it stop there? Did it? You know, that was some 20 years ago, that statement.

Let's take a look at exhibit 3375. Here is a 1990 letter from RJR to the principal of a middle school,

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an elementary school principal. And it says, a fifth grade class -- if we take a look at the bottom blow up. "Despite all the research going on, the simple and unfortunate fact is that scientists do not know the causes of the chronic diseases reported to be associated with smoking."

This is a year after the 25th anniversary '89

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Surgeon General's report. As you heard these witnesses testify, no disease has ever been more well-documented by this time, and yet RJR in this letter asks that that information be passed on to the students.

Now how did that happen? How did an organization that had the Surgeon General and the medical community and different people coming out and saying one thing, how did it continue to move forward? How did it keep everybody back?

Well, I'll tell you, it kept them back because of this organization and the way it operated. And what you are going to find out, and what you know already from the evidence is that what was -- this organization in here, these three groups were run by the companies, and they were run by the lawyers, the Committee of General Counsel, and it ran right around the CTR.

And you'll see other documents where TI was, just in their own words, these are the industry's own

words, just a spokesperson for the lawyers.

And so what it was, was CTR with Hill & Knowlton going in-between and TI, what they did was they kept the information flowing that the case was not proven, that cigarettes were not addictive. And they drafted, they drafted in expenditures, the amount of money with their ad campaigns and everything else that the public health community -- the impact the public health community was having.

They not only did that, they were the ones that knew the most about their own product, and they didn't share that information with the public health community.

Let's take a look at their own documents to see what they are saying. There are some interesting things going on here, because you did see that BATCo was doing a lot of research over in Europe consistent with the gentlemen's agreement. There was no quote restriction on BATCo, even though they were related to B&W in doing that research.

Let's see. So they did that research. The question is, did it get disclosed the way it should have through Brown & Williamson, or did BATCo participate with Brown & Williamson in this fraud?

Let's take a look at Exhibit 161, the cutout from the 1958 trip meeting.

This was on the next page of that earlier document that I showed you.

In 1950, Liggett and Myers stayed out of TIRC originally because they doubted the sincerity of TIRC motives and believed that the organization was too unwieldly to work efficiently. They remain convinced that their misgivings were justified. In their opinion TIRC has done little, if anything, constructive, the constantly re-iterated not proven statements in the face of mounting contrary evidence has thoroughly discredited TIRC and the SAB of TIRC is supporting almost without exception, projects which are not related directly -- look at this -- not related directly to smoking and lung cancer.

That's exactly what they said they were doing in 1954 with the frank statement and here internally. And these documents just came to light in the last couple years. Internally they are saying, hey that's not what that organization is doing. They are not investigating

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smoking habits. They are doing fundamental applied research.

Do they do some every once in a while that does indict smoking? Yes, but for the most part, their research, in their own words, was not up to snuff.

Let's take a look at how the lawyers that were running this organization describe it.

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Let's take a look at Exhibit 1911. This is in a November, 17th, 1978 document at a Philip Morris files written by Seligman. And if we flip over, Bill Shinn describes the history, particularly in relationship to CTR. CTR began as an organization called, we know that, the TIRC. It was set up as an industry shield.

Well, that's not what they said in the frank statement. CTR has helped our legal counsel by giving advice and technical information, which was needed at court trials. CTR has provided spokesmen for the industry at Congressional hearings. The monies spent on CTR provides a base for introduction of witnesses.

Nowhere. That, that was nowhere in any public statement. In fact, throughout the years they constantly reiterated how independent CTR was.

There is one person that knew whose name keeps coming up throughout this trial. He was a scientist at work for Lorillard. He was in a position to know what was good research and what wasn't, and he became today the CEO of Lorillard.

Let's see how he describes what the CTR was doing in 1974. And this is Alexander Spears. If we take a look at 1328. This is Spears chief scientist at the time, writing to Mr. Judge, the CEO. And here is what he describes the CTR is doing. Historically, funded smoking

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and health research programs have not been selected against specific scientific goals but rather for various purposes such as public relations, political relations, positions for litigation, et cetera.

Wait a second. What are these guys doing making these selections? What is the industry doing making those selections? How did that happen? I thought it was the Scientific Advisory Board.

Well, it turns out that that organization was set up in the wrong way. That the Scientific Advisory Board, the things they were given to consider, the grants that they were forwarded, the direction that that organization was sent, impeded that organization from carrying out the directives that they said they would in 1954. And that was to investigate smoking and health.

Did they fund reputable institutions? You bet. Right here in Ohio, Ohio State, Harvard, Yale, UCLA. How about the scientist that did the CTR projects that the SAB assigned? There is nothing wrong with that. Most of those projects were done very well by reputable scientists and published.

We see a diversion of what happened later with the special projects but still the bulk of the work, they keep saying well, that special project you are working with Mr. Doug Lynn, that was only five percent of the

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work.

So we have to look at that 95 percent and just forget that five percent? No, the bulk of this work here,

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that he's talking about, that Spears is talking about, was not directed at where it should have been. And as a result, CTR allowed this industry basically, what somebody could refer to as a toilet bowl, for lack of a better name, to be able to stand up and say, not proven, not prove, not shown, not done, not addictive.

How do you know? Take a look at the CTR and the Scientific Advisory Board. We have independent -- independent people taking a look into this stuff. So it allowed them a voice when they otherwise would not have one. It allowed them to have an impact that they wouldn't have had on their own. They could have had it. They could have done the research on their own. They could have come clean, but the CTR, this big old CTR and TI, especially allowed them to have a voice that they wouldn't have had.

And how do we know the lawyers controlled it? Not my idea. Let's take a look at their own internal documents. Let's take a look at 1900, Exhibit 1900.

Focus in a little closer.

This is from the Director of Laboratory, Sheldon Sommers, to the Director of CTR at the time. And

he complains that CTR is essentially being run by the lawyers, and he suggests that, I think, CTR should be renamed Counsel for Legally Permitted Tobacco Research or CLIPT for short.

You know that would have been the right name. They named this organization that in 1954. Maybe we wouldn't be here today, but they didn't. No, they called it something else. They called it the CTR and said it was completely independent.

You see Dr. Rubin when he was shown this document, he knows these guys, he knows who these people were. And when he sees Sommers writing to Gardner in this -- in that manner, that was a little upsetting.

And I said to him, now, would that be wrong? And he said, that would be wrong.

Let's take a look at Exhibit 448. This is a 1964 trip report from the TIRC that came over to the United States. And if we take a look inside, it talks about here, if we could blow up the bottom, it talks about the influence of the lawyers in consequence of the importance of the lawsuits.

And that's an interesting thing. They were afraid of the lawsuits, so was it right, because you are afraid of the lawsuits that you go down the wrong road? No, it's not right. But they kept fighting them for 40

years, for 45 years.

The main power in the smoking and health situation undoubtedly rests with the lawyers and, more particularly, with the Policy Committee of Lawyers.

This is the lawyers that we are looking at that controlled that.

The members of the -- if you go to the next page, and zoom in on the top part. These are the lawyers that were running those organizations at the time.

And we heard about Ramm, how people complained about him later, how he ran everything and decided, well, these people are all associated with the companies, they are not just lawyers of the companies, most of them are Vice Presidents and officers of the companies too.

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It says this committee is extremely powerful; it determines the high priority of the industry on all smoking and health matters.

That's unbelievable. What does this table here have to say? What's this table here have to say what the health industry is to be from this? It would be outrageous. This would be outrageous. Their isn't any training here, these aren't the people who were supposed to be doing that.

Let's flip over, see what they say.

CTR continues, as before, to confine its

research to the diseases with which smoking is not statistically associated. This is the sister organization over in Europe. They know what CTR should be doing but it's not doing it. Let's take a look at why.

If we look at Exhibit 4086.

This is a 1968 organizational chart. I couldn't have drawn this chart up better. And you know I couldn't because you have seen some of my drawings. I could not have drawn this chart up any better. But I didn't draw it. This is their organizational chart.

And if you take a look at it, it's the General Council Committee interfacing with each of the companies on the Board of Directors. And who answers to that? Scientific Director. Off to the side, you have the independent research section, and under that the SAB. And you have over here the special projects, that there was no public acknowledgement of those and how those were done despite what Dr. Rubin said about the little thing on the end, special project that like, that alerted people. There was a whole separate organization going on there. That's how this was run.

This organization was wrong from the get go. And it was set up for the wrong purposes and operated the wrong way. That's not to impugn the integrity of a lot of the scientists that did good work there, or the

institution that did good work, that was awarded by the SAB over here, for the grants over here, down on this side, down in the corner.

But when you have an organization that's run like this, where industry projects the advisory committee, ad hoc committee, special counsel, that was wrong. And that's not what they set out.

But it is not just us saying it wasn't independent, it's not just us saying that. Take a look at the next document, which is a 1992 document dated October 22nd, 1992.

And it talks about what a number of people within the industry says, Damon says after nicotine flap. The independence of CTR is forever tainted. Shin talks about Sommers, who we saw earlier, has affected independence.

Let's see what the guy who knows, Alexander Spears, said about CTR. CTR is not independent because of what we have asked them not to do. This influences design of experiments, not truly independent.

That's what Spears said about the CTR. That's what Spears said about the hub in the middle of this wheel, the organization that was supposed to be independent. These guys, these companies controlled that organization.

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If we take a look at the next document, 952, there is a candid assessment. If we blow up this, this is a Philip Morris 1970 document from the chief scientist to the President. It has been stated that CTR is a program to find out the truth about smoking and health. What is the truth to one is false to another.

This is exactly the mantra they come into these courtrooms with. It doesn't cause diseases, it's not addictive. When you get too close, when you put on enough evidence, in comes the guy at the end, Martin.

Everybody knew. Everybody's known all along. The CTR and the industry have publicly and frequently denied what others find as truth. And they knew it, and that truth is right there in quotes.

Let's face it, we are interested in evidence which we believe denies the allegation that cigarette smoking causes diseases.

This is 15 years after the formation of that organization, and they have been sending out those press releases saying, hey, we are not trying to, we are not interested in anything, we have got no axe to grind, were their words. We just want to find out the truth and publish it.

That's not what these people that were in a position to know -- not me, them -- their words were, in a

position to know.

Take a look at 1092, its a document from the Tobacco Institute. The other side of that hub. And it's a 1972 document from Freddie Panzer, who worked there, to the chief person in that organization. And it says, for nearly 20 years this industry has employed a single strategy to defend itself on three major fronts, litigation, politics, and public opinion.

And let's see what they did, if we take a take a look, and what was that strategy: Creating doubt about the health charge without actually denying it.

And how were they able to do that? Through the CTR and the TI, and it helped them on the litigation and political front as well as the public relations front.

And it impacted this strategy, these aren't -- these aren't our words, these are theirs; for nearly 20 years they employed that. That was 1970, they had another 25 to go, because these documents didn't come out at that time, they didn't surface publicly.

And so what did CTR become? If we take a look at Exhibit 4109, if we take a look at the bottom. CTR is the best, is the best and cheapest insurance the tobacco industry can buy. And without it the industry would have to invent CTR or would be dead.

That's what they wrote at a meeting -- at a CTR

document, a CTR meeting. That's what CTR really was all about.

Now, let's take a look at exhibit -- this is most telling -- Exhibit 1749. Exhibit 1749 is a November 29, 1977 document from T. Osdene. Well, you know who he is. T. Osdene is the guy, Tom Osdene was the guy who we saw on the tape over here taking the Fifth Amendment. And so he's the guy who's not talking now. And if you, if you remember the judge's instructions, that you could take that adverse inference but only against a company that he

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worked for or only against him.

Okay. Here is what he has some comments about the CTR program. Remember in the mid-70's, I was talking to Dr. Rubin about a Dr. Kreisher who went to work at CTR. Some people went to work there that were pretty good, and they started programs and started to break out.

And Dr. Kreisher's work in the area of AAH, from my point of view, starts out with the proposition that smoking causes lung cancer.

How could he not? It was 1977, any scientist should, any scientist would be in that position if you are investigating the cause of disease. What does he say?

It is my strong feeling that with progress that has been claimed, we are in the process of digging our own grave.

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That's the end of that. CTR has changed and moved forward and remains in the control of the lawyers, and we see in 1981, if we take a look at Exhibit 2331, we take a look at that, what happens? The lawyers take more control. And then we have the ad hoc committee, and we talk about Ed Jacoby. These special projects are litigation and hearing oriented. Witness development. Fill in knowledge gaps. Scientific endeavor. That's what's going on with special projects.

And let's take a look at the bottom paragraph, because it goes to what they were doing with some of these things. The difference between CTR and Special Four projects. And it talks about the Director of CTR will review the special projects. Okay.

And then it talks about, also, if there are work product claims, need the lawyers' protection, e.g. CTR's past Director, Bill Gardiner, didn't think much of Rowe's work; Special Four financed him and he is now published, e.g., motivational research that was done during FTC investigation was done through Special Four -- for the lawyers protection -- because of possibility that CTR would be -- if we go to the next page -- CTR would be subpoenaed, e.g., Joe Janus' current study of cohort affect, those born in 1890 to 1910, is a full CTR project. Special Four gave interim support.

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In other words, they decided what projects to fund based on the possibility of discovery. And if they were a sensitive project you could see through the other documents that were admitted here. If they were a sensitive project, well then, the lawyers funded them themselves. And why was that?

Lawyers getting a pretty bum rap in this trial right now, and you know what? They should have gotten it with activities like this that controlled this and to use the privileges that are set up, the privileges that are set up so that you can deal with clients in an open and straightforward manner. And what they did here, is these people that were associated with this company, that were Vice Presidents and officers of this company, that were also lawyers, used these privileges and these work product and lawyers privileges to keep information from being discovered. And that was wrong.

That was wrong, and that was not what they.g told the public that they were doing. And let's take a look at who funded the CTR projects. Take a look at the last exhibit.

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Exhibit 2606 is a document that sets forth the funding and how it's going for CTR, and talks about the plans for a meeting. If we take a look inside it talks about the special projects. Research directed at industry

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problems; witness development objective; approved by general counsel -- that's the general counsel that we saw running the show -- and funded through the CTR.

Well, that information wasn't made public; not that information. And that subverted everything else. And as we got into even more -- in a more deadly deception than the disease and causation, if that's not bad enough, what's even worse, as we move forth in time is now we learn from these documents that we have gotten from the industry, is that they knew how addictive that their product was, that nicotine was. They knew that the cigarette was the best nicotine delivery device there could be, because if you smoke a drug you get it into your system so much quicker.

So what did they do? They again moved into another front to subvert the information as to nicotine, and nicotine addiction as to cigarette design, and to nicotine manipulations, and to see what they knew about that. Let's just take a look, first of all, what they were saying about addiction.

Take a look at 3213. This is 1988, when the Surgeon General's report comes out. And it talks, these are the guys who are cooperating with our public health officials, officials entrusted with our health.

"Claims that cigarettes are addictive

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contradict common sense."

That's the press release they are issuing. And in 1994, you know, they stood up in front of Congress, the CEOs, and made the same statement about 8 years later.

Let's see what they knew. You saw Dr. Parran come in here. Dr. Parran came in here from Cleveland, the person that trains literally everybody in northern Ohio about addiction, and nicotine addiction in particular.

And I thought that Mr. Adelman made a good point when he was talking to Dr. Cloninger. In one week, in one week Dr. Parran sees more patients than Dr. Cloninger will see in a year. More patients that are addicted just to nicotine and smoking, because that's his practice.

And you remember his testimony about how addictive nicotine is. Even much more so than some of these drugs that we associated with deviant behavior, like heroin and cocaine.

Talk about the level of addiction, how it's 70 percent. It's at such a high level for nicotine, whereas for cocaine and heroin and some of these other drugs it's down lower at 10 percent that are really, just can't get away from those drugs. That's how deadly nicotine can be. And it has such an impact on your health, it's all the more deadly.

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Let's take a look at what the defendants knew about some of that just quickly.

If we take a look at Exhibit 1054. If we take a look inside this exhibit, exhibit -- let's see, this is the -- way down in the 1970's memorandum talks about the majority of the conferees. This is at a nicotine

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conference they went to. And they published a book, and I think they saw the defendants walking around with a book.

You can literally go down to the library and get that book, and it was holding it and like they published everything in that book. I'll tell you what you won't have the first half of this document in that book, you won't have these statements here that talks about no one has ever become a cigarette smoker by smoking cigarettes without nicotine. You won't have the first part of this document in that book, as they waived it when those conferees published those things. This is truly what Dr. Dunn thought about nicotine smoking, if you flip it over to the next page.

And you seen -- zoom in -- it talks about the cigarette should be conceived not as a product but as a package; the product is nicotine. The cigarette is only one of the layers. There is a carton which contains the pack, which contains the cigarette, which contains the smoke. The smoke is the final package. The smoker must

strip off all these package layers to get to that what he seeks.

And what does he seek? He seeks nicotine. And he talks about how great, how great it is. This is their knowledge about it. It's not until 1988 that the Surgeon General comes out that the defendant defended a statement about addiction.

Let's take a look, this is from Philip Morris; let's take a look from the same time period from RJRT, Exhibits 1087. Take a look at a Claude Teague memo, who was one of their chief scientists at RJRT, and let's see what he thought about what the tobacco industry was doing, what kind of business.

If we take a look at just the top part, "In a sense, the tobacco industry may be thought of as being a specialized, highly ritualized and stylized segment of the pharmaceutical industry. Tobacco products, uniquely, contain and deliver nicotine, a potent drug with a variety of physiological effects.

That's what this industry is writings about at the time. And it's not enough they know about it and are writing about it, let's see what RJR does as they, let's say, refine the process of designing the cigarette. And you have seen some of the documents here that talk about, hey, it was no fluke that Marlboro took off and captured

the market; that some of the scientists at RJRT thought it was because Marlboro, Philip Morris had thought to design the cigarette better.

What did that mean? That meant, to get more nicotine kick, free up nicotine.

Let's take a look at what they did as far as design. If you take a look at Exhibit 3496-B, its 1991, talks about "rest program review." Reconstitute the tobacco. And if we take a look at the key issues, it talks about how they can "independently control nicotine delivery, from very low to elevated levels, to address consumers wants and as a research tool."

That certainly seems contrary than what they are saying throughout the years about just being a natural product. Here they are, they can independently control the delivery, not to make sure that they have got it back in the nicotine, that they took out, but to

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address the consumer wants, and as a research tool.
And look at down here, number 5, pretty interesting. It reduces biological activity of smoke. They don't admit that it's still a cause of disease, but here they are internally talking about this. And let's see the next company, BATCo. See what they were talking about.
THE COURT: You used just an hour.

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MR. COUGHLIN: Excuse me?
THE COURT: You have used an hour.
MR. COUGHLIN: Thank you.
BATCo was saying many of the same things. Let's move to Exhibit 1868. Let's see what they are saying internally at B&W. This is in 1978. Very few consumers are aware of the effect of nicotine, its addictive nature, and nicotine is a poison.
They know this stuff internally, and yet what happens? Are there the disclosures? No, for 20 years. Let's flip to Exhibit 754.

Q. This is a Philip Morris Document 1969. "I would be more cautious in using the pharmic-medical -- do we really want to tout cigarette smoke as a drug? It is, of course, but there are dangerous FDA implications to having such conceptualizationns go beyond these walls."
What kind of talk is that? What kind of talk is that between the top scientist of these companies? I'll tell you what, it's unlawful. It's unlawful. It's this kind of talk, it's the kind of talk here that we have here, where they are tampering with the evidence. They are obstructing justice and they are issuing those statements, the mail and wire fraud statements, those kind of things that's going on with all these companies here.
And as I look at this, as I looked at this

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graph here, I was thinking that this design -- and I don't mean to say it just because we are here in Akron -- but it seemed like it got to be like a tire that just got rid of everything in its path, got the water off the roads, got rid of hazards, and got rid of everything else.
And I saw the other day a tire that they were advertising, that Goodyear was advertising, and it was called run flat. And what it reminded me of is that it ran over some nails and ran over some big corrugated metal and everything else.
And it reminded me about Liggett. And it reminded me that Liggett had gone into this tire and it pulled it out; and you heard Ben LeBow come in and let all the air out of this tire. That he came in and he said, hey, you know what, we know, we knew cigarettes were addictive, and we knew they caused disease. And we knew it for years.
And you know what? We targeted children. We targeted our product to children. That's when he came in and he said the industry targets children, and he admitted, and you saw for the first time, even without the Surgeon General's warning, that he had his company put on the front of those packs of cigarettes, that nicotine is addictive. That's the company saying that.
They are not hiding behind the Surgeon General.

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We had such a tough time trying to get an answer out of any of these witnesses. You were here. Are you saying

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that smoking causes cancer? I accept that the Surgeon General -- no, are you saying that they would not give you a straight answer?

Well, hopefully, hopefully this isn't like that tire that Goodyear was able to design. Hopefully it's not a tire that you just keep running, and just keep running over people who make revelations like Mr. LeBow or Mr. Farone who came forward in the this trial.

If we take a look at Exhibit 1208, and this is a 19 -- this is another Teague document. And we talk -- let's take a look at what they are doing and what RJR realized about free nicotine.

It talks about smoke pH and free nicotine, in essence a cigarette is a system for delivery of nicotine to the smoker in attractive, useful form. At normal smoke pH, at or below 6, essentially all the smoke nicotine is chemically combined with acidic substances. It talks about how if you move the pH up you get free nicotine, and if you get the free nicotine -- and we saw that chart sitting over there for a long time where the nicotines are outside, they are pronated and unprotenated nicotines. And that those have a bigger impact or a more immediate impact when they hit your brain. And that's what they

realized was going on with a couple of these other cigarettes.

As they were analyzing them they talked about Marlboro and Winston and Salem and Kool and trying to figure out what it was, how come some of these brands were being so successful and these smokes contain more free nicotine than our comparable brands.

It says, as a result of its higher smoke pH, the current Marlboro, despite a two-thirds reduction in smoke tar and nicotine over the years, calculates to have essentially the same amount of free nicotine as an older cigarette.

Essentially that's what they knew then. And we know we saw the other documents where Philip Morris, where RJR kept watching Philip Morris and what they were doing.

And if we take a look at Exhibit 1935 and documents like that, that essentially RJR caught up to Philip Morris after a 10 year period of time -- it was too late by then -- essentially on the market share, that Philip Morris had captured such a significant part of the market share it kind of kept steam rolling along. But they changed their ways, at least as to the design of the cigarette.

And if we take a look at 3318, this document is talking about the use of ammonia. The use of ammonia, we

know what it is used for now, "the current usage of ammonia in the tobacco industry - BAT and Competitive.

"The U.S. cigarette industry uses about ten million pounds of ammonia compounds a year.

"RJR alone has ammonia emissions of 900,000 pounds a year.

"Five of the six major U.S. cigarette manufacturers use ammonia techniques.

"AT has been essential in B&Ws successful development of non-menthol cigarette products at or above par with Philip Morris brands."

That's what they are all doing, freeing up the nicotine to get the desired kick that they needed to get.

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Now, we talked about, we talked about the destruction of documents. And if I could bring up exhibit, the Osdene note.

This is Dr. Osdene's note, and you heard Dr. Farone come in and testify. And it talks about shipping all the documents to Cologne to keep in Cologne and essentially that these will be destroyed. That's what this document says.

And Dr. Farone came in and said, that's what Dr. Osdene told me, that's consistent with what he told me was going on.

And the question: And is that statement

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consistent with what he told you?

Answer: Yes, Dr. Osdene told me he had a safe in his house where he kept both his stamp collections. We were both stamp collectors. And documents that he received from INBIFO, he would read them. They're provided. They provided information to us, and destroy them after he read them.

So sending them over to be destroyed and getting them back and destroying them, that's what was going on.

If you take a look at a second -- in the meantime, as we take a look for that.

(The tape was played for the jury.)

Essentially you heard him say that again and again. And I think you have seen enough of it, and you have got the transcript you can take a look at what he took the Fifth to, as to the various questions that he was asked.

And did these industry giants did they conceal evidence? If we take a look at Exhibit 364, it's a telex at Brown & Williamson Corporation between Yeaman and McCormick.

Over here, it says, "prior to receipt of your telex July 3rd, Hoyt of TIRC --" so now we have the TIRC involved in this. They are in the middle of this exchange

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between these two company's. "Agreed to withhold disclosure of Battelle report." And you saw what that report was all about; some of those Hippo 1 and 2 projects on nicotine to the TIRC members or the SAB, here they are, here's the guy working at TIRC with the industry connection withholding this information from the Scientific Advisory Board "until further notice from me. Finch agrees submission Bagatelles or Griffith developments to Surgeon General undesirable."

Why would they submit it? Maybe they come up with some report it wasn't quite finished, but here, that's not the reason they give. "We agree continuance of Battelle work useful but disturbed at its implications re regarding cardiovascular disorders." That's why they withhold that report.

They don't hold it because it wasn't quite finished, this tells you why they withhold the report; they withheld it because it was bad, bad for them.

And if you go through and take a look at all the other documents, take a look at Exhibit 218, that identifies carcinogens. It's an RJR memo. And where they identify that they haven't disclosed some other drugs that are carcinogenic that have been identified by others, Exhibit 250-A, Liggett and Myers, a 1961 Arthur D. Little

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report.

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Exhibit 364, we took a look at that. That's it right there. Exhibit 480, Exhibit 583, Exhibit 539, 498, 2473, Exhibit 2122. All of these exhibits, and literally they go through these boxes, the boxes you have back with you, you will just see example after example where they kept information back or concealed it or destroyed it, knowing, knowing that these investigation would be going on by the Surgeon General, by the FDA, by Congressional hearings. And they did that so they wouldn't be discovered. And people like Osdene, and in this case people at B&W, are doing that.

And what did all that have -- what impact did all that have? Well, the impact that it had, as you heard from Dr. Jaffe, is -- the impact that it had was that the public health community didn't know everything that the tobacco industry knew. And certain cigarettes that were supposed to be safer, that were allegedly safer developed by the companies, they weren't.

Saratoga, they weren't marketed as safer. I'm sorry. The companies believed internally they were safer, at least that's what they wrote.

Fact, Premier, Eclipse, Next, Project XA, the one from Liggett we heard about, Aerial, all those cigarettes, they weren't marketed as safer products because that would have violated the gentlemen's

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agreement.

And they talk about the FTC rule, somehow the FTC rule that prevents these people from marketing a safer cigarette. Now you know what, there can be no such worry. There is no such governmental agency that says keep that truth from me. We don't want to know. Don't come here and say we do have a product that could be safer and let us -- let us market it in this way.

I mean, those rules were put in, you know, in the 50's, because claims were being made that weren't substantiated. They didn't apply to claims that could have been made and could have been substantiated.

Now let's go to the last part of where are we now. We are at the children.

This whole scheme, this whole scheme depends on getting the children. 81.9 percent of the new market. 81.9 percent of when -- let me say that again -- 81.9 percent of the children start smoking before the age of 18.

In other words, everybody starts essentially before the age of 18, where they are old enough to realize and appreciate the risk and dangers of taking it up. And did the tobacco industry know this? Yeah, they did.

Then we take a look at Exhibit 1421. This is Myron Johnston, this is a Philip Morris document. And you

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heard Mr. Morgan come in and say this guy was just a demographics guy, that he was not in the Marketing Department.

Well, he wrote these memos to R. B. Seligman. "I pointed out that the 15 to 19 year olds is now increasing more slowly." It is my conclusion that Marlboro's phenomenal growth rate in the past has been attributed in the part to our high market penetration of young smokers and the a rapid growth in that population.

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And he is talking about 15 to 19 year olds.

He writes those memos for 20 years. There is no memo saying, hey, don't write those. And Mr. Morgan tries to put him off as just a guy doing demographics. But you know what? Farone came in here and he went to some of those talks and he said marketing people were there. And he says Myron Johnson had connections up in New York with marketing and that he was one of the favorites, one of the favorite guys being listened to by the marketing group.

And if you look at Exhibit 2279. This is Myron Johnson again, later years, we go inside, that document said, "it is important to know as much as possible about teenage smoking patterns and attitudes. Today's teenager is tomorrow's potential regular customer." That's what Philip Morris is doing.

They know that it's during the teenage years, as he writes, that initial brand choice is made. And at least part of the success of Marlboro Red during it's most rapid growth period is because it became the brand choice among teenagers. That's what they write there.

And if we go to the next document. This is what -- this is what Mr. Farone testified to about Myron Johnston, about what he was doing.

"Mr. Johnston was one of the favorite speakers for our monthly Richmond meetings, where the senior management from New York, President of the Philip Morris USA, sometimes the officers of Philip Morris Incorporated would come down to hear what we were doing at the Research and Development center."

And if we go up -- come down on that next page. "Did some of those talks, some of those demographics refer to smoking by children, by people under age 18?

"Yes, they did.

"He had a very good reputation. He had a lot more contacts than the rest of us did with people in marketing in New York."

That's who Marvin Johnson was; not some nitwit writing articles in the back rooms of Philip Morris, he's being listened to by the President of this, by the President of this corporation.

Let's take a look at Lorillard. Exhibit 1871. Let's take a look at what Lorillard says in 1978 about where they get their market from, that the base of our business is the high school student.

Newport in the 70s is turning into the Marlboro of the 60s and 70s. And it is the in brand to smoke if you want to be one of the group.

That's outrageous, they know that they are targeting those children, and we saw the other documents where we know they are.

Let's take a look at B&W, exhibit 1163.

Kool has shown little or no growth in the share of users in the 26 plus age group. Growth is in the 16 to 25 years old. At the present rate, a smoker in the 16 to 25 year age group will soon be three times as important to Kool as a prospect in any other.

That's what they know internally and that's what they geared those ads for, where we saw the young athletic people looking sexy in those ads. I would say that athletes are not very good at telling ages, but

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that's what we saw in those ads and what they were trying to get people to remember.

And did they influence, you heard a lot of talk about it's peer pressure, it's peer pressure, and adults; that influences children to start smoking. And I don't

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think we ever said anything different.

In fact, Dr. Pierce's article was put in, but how it was peer pressure and family influence are some of the major things that people uptake smoking. He also put this, the fact that 34 percent of that group is directly influenced by advertising promotion that causes, that causes them to smoke.

Let's see what RJR tried to do, if we take a look at that, the next document in line.

If we could go in -- no, next. Sorry. This is still Kool.

Let's blow this up in here. This is a document, if we take a look at it closely it says, advertising objective: Overall, Camel advertising will be directed toward using peer acceptance influence to promote the motivation for target influences to select Camel.

They are using their advertising to impact that peer pressure. So however Pierce was able to isolate it out, as far as advertising promotion from these other confounding factors, how much is it when you have a company that knows exactly what it's going after.

Let's take a look at the pie chart of who that group is that RJRT was going after.

Well, here is when people start to smoke. Everybody starts to smoke literally before the age of 18,

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that's 81.9 percent. That is such a huge figure. They talk about how it is such a little slice of the pie. You know why? What do little kids do? They don't smoke that much. But as they grow and mature they blossom into the market not only in the amount of cigarettes that they smoke -- and you see that in the document -- they grow in size, in percentage. They start smoking one, two cigarettes a day and end up smoking 20 and 40. So you can see the percentage going up there.

And now you have a million and now two million kids a year are entering into this group. And yes, while they are one percent of the market at first, they blossom into it and every year, that's how this market is renewed.

And you heard Ben LeBow say, hey, if we weren't getting kids we would all be out of business in 25 years, and that's what we should be doing, but that's not what these companies are doing.

Let's take a look at the next slide.

This is a presentation to the Board of Directors in September, 1974. And it talks about, literally, this is in '74, RJR starting to lose out to Marlboro, as Marlboro passes Winston, as seen by this chart, the children, the 14 to 24 year olds who represent 27 percent of the population in '75, they represent tomorrow's cigarette business.

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As this 14 to 24 age group matures, they will account for a key share of the total cigarette volume for at least the next 25 years. That's what RJR realized at that time period.

And if we take a look -- do would he have that?

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If we take a look at 2176. This document here, 2176, has got to be one of the most damning documents in this case. This is from Jerry Long, G. H. Long to Ed Horrigan talking about teenage smokers 14 to 17 years old, okay. And he talks about the demographics, what's going on with them, and that they are losing share to Marlboro. That is dropping -- that there is dropping versus Marlboro.

"More importantly, the report further indicates that RJR continues to gradually decline, and between the spring and fall of 1979 periods of RJRs total share declined from 21.3 to 19.9.

"Hopefully, our various planned activities that will be implemented this fall will aid in.some way in reducing or correcting these trends."

That document offers only reference to the illegal 14 to 17 year old market. This guy was brought in in that time frame to turn this brand around. He's the guy that was overseas, that was overseas with the funny French camel. Is it any wonder after several failed attempts with, you know, the Turk and some other things

that failed that we get Joe Camel?

Pretty interesting, when Mr. Morgan was on the stand and he said, you know, if you get three out of ten advertising campaigns that work, you are in the hall of fame. You are a 300 hitter.

That's right, there are a lot of failed campaigns. So when they slap up some of these foreign campaigns that failed, that's not the point. When they hit on one that works, that gets their target audience and they continue it, and they continue it in the face of criticism, when they know it's attracting kids, that's what's wrong.

Let's take a look at what they decided to do to cover up their tracks. Look at 2357. And you can blow this part up. This is a 1981 document from RJR.

And it says, "the purpose of this memo is to recommend aging all known under 18 year old smokers into the NFO Panel Data at age 18 and classifying them as continuing smokers."

Miss Beasley didn't want to talk about this document. What the document tells you is that they are not going to talk about kids anymore, they are going to age that whole group and they are not going to call them continuing smokers at age 18. So you won't find reference like that in their documents anymore.

You do, you do later on still find them, but they try to get rid of all that. And that's what this document was talking about in 1981, a critical time period for RJR.

And now if we could take a look at Exhibit 2692. Do you have the Burrows tape.

(The tape was played for the jury in open court.)

MR. COUGHLIN: Let's take a look at Exhibit 2692, the presentation that was made. That presentation was all about marketing to kids, and it was in 1984, it was in February of 1984 and it was to Diane Burrows, to the top people in this company. Over here you have Mr. Long, the guy over from International, what he knew about the French camel. Let's take a look at what this document says.

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"The importance of younger adult smokers.
"Younger adult smokers have been the critical factor in the growth and decline of every major brand and company over the last 50 years. They will continue to be just as important to brands/companies in the future for two simple reasons:
"The renewal of the market stems almost entirely from 18 year old smokers."
Well, not -- you are not born 18, so you got to

become 18 and then you have to move in, to quote the legal market, and we already know three years earlier they acknowledged everybody under that age right into 18.
"No more than five percent of smokers start after age 24."
You see everybody get on this stand and they kept testifying, oh, we are going after this part of the market, they have 85 percent of it; they have got 20 percent of it. If that was true, those circles where they have that, that Jerry put up those circles, concentric circles, meet each other in the middle. They would get smaller and smaller if they were just stealing each others' brand shares.
They are not stealing each others' brand shares. That's not how this industry continues to grow and, quote, stay alive. What they are doing is attracting the new smokers. Why? Because it says right here:
"The brand loyalty of 18 year old smokers far outweigh any tendency to switch with age".
Because Diane Burrows is just telling the truth. She's telling the truth within that company and making a presentation. And some people saw it, they liked it.
Can you imagine if this document was presented and she couldn't keep tract of how many times it was

presented, that she went around and presented it to everybody in the country? What did she say, hundreds of people. She made a presentation to these people and marketers like Lynn beastly.
Let's take a look at the next major -- and blow this up.
It talks about the "younger adult smokers are the only source of replacement smokers. Repeated government studies have shown that:
"Less than one-third of smokers, 31 percent, start after age 18.
"Only 5 percent of smokers start after age 24.
"Thus, today's younger adults smoking behavior will largely determine the trend of industry volume over the next several decades. If younger adults turn away from smoking, the industry must decline, just as a population which does not give birth will eventually dwindle."
She couldn't have said it better. She couldn't have said it better than Mr. LeBow.
And let's turn to the back of that Appendix B and see who she is talking about.
THE COURT: Go ahead, Mr. Coughlin.
MR. COUGHLIN: It talks about Younger Adults' Importance as Replacement smokers. And then go down here

and go to the categories and show who's smoking when. And

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most of the people are smoking and starting -- we have seen those documents. Actually they start at the mean age of starting smoking at 14 and a half. And that's what you have here is 14, 15, 16, 17 year old smokers up here. That's when they are taking off smoking.

And down here she does the percentages all the way down to 12 year old. That's the report that she gave to this company. And those were the recommendations that were sent out to what they had to do to essentially survive and prosper.

And if we go to Exhibit 2849. And if we take a look, this is 1985 document; talks about the Funny French Camel. And, "this is to advise that we have no problem with tobacco company using the design of the Funny French Camel used in the past in France."

Miss Beasley didn't even know about the studies done in '58. She didn't know the promotional items; you didn't know the focus groups until the light bulb went on in her head later on.

And Mr. Long, over in international, didn't know they had all those problems in France with the Funny French Camel. And here they are being notified that it was done at a time they were attempting to youthen the brand over there in France.

And what's the results of that? Well, first of all, here is Exhibit 4247-A which is the book that it appeared over in France a lot, Pilote. And the result is this campaign. And it was, as they say in this book here -- take a look at this Exhibit 3956 -- one of the most successful advertising campaigns ever. A Camel named Joe, and that's what it was.

And if you take a look at the CDC reports from that time period, what you have is a 70 percent rise in teen smoking during the ten years of this campaign. And there was an uproar in '91, and did they put pull it? No. Why? Because it was a reversing of their fortunes against one of their competitors. And that's what happened here. We had this industry. We had this industry that knew about disease, they knew about addiction, they manipulated nicotine, and they targeted the children.

Safer cigarettes were expressed, at least the marketing of the safer cigarettes. And as official investigations were ongoing, things were suppressed and concealed, and they helped each our other out in this conspiracy, and they helped he each other out in this corrupt activity, and helped each other out, which is the -- first of all, all that happened.

And the impact of that was that it caused the health fund``s that we represent, my clients sitting over

here from the health funds, that you will be deciding on later, that they run those, the trustees that take care of and implement those programs as best they can, from the advice of professionals and with the facts that beneficiaries are also impacted by this information.

They did the best that they could, but the health funds suffered damage. They suffered damage, and we are here today to ask you to make them, for once, take responsibility; to take responsibility for their actions. And to take it now and to fess up and stop doing the things that should have been done, and to pay for the cost that they have and should have.

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And now my partner Jonathan Rowe will address you shortly.

THE COURT: We'll take about five minutes. This is an appropriate time. I'll just give you five minutes to move around.

Same admonitions apply. Don't talk about the case until you begin deliberatins. Take five minutes and don't go anywhere and we'll just give you a stretch break.

(Brief recess.)

THE COURT: If you will please be seated.

Let me just caution, anybody that's in the back of the court standing, leave the room. Anybody that's standing -- wait, wait, wait. Those of you who are

standing, get out of the courtroom. Stand up, sir, and remove yourself, you in the blue suit, and get up and get out of the courtroom until there is another break.

At this point, this time, the court is going to continue the final arguments. And I'll afford Mr. Rowe and an opportunity to comment.

And I'll caution everyone, a courtroom is not something -- wait, wait wait. You can come in, you're my law clerk. But everybody else stays out. Wait. Everybody stays out until the next break.

Mr. Rowe, you can begin.

MR. ROWE: Thank you, your Honor.

Ladies and gentlemen, in the three weeks we have been together, when you may have had other plans, you have learned a lot of things. One of the things you learn is when lawyers make predictions of time they tend to take, they are generally not reliable, but I am going to do my best to get this done within 40 minutes.

The subject, what I'm going to address, Mr. Coughlin has cautioned about the misconduct of the defendants that constitute corrupt activity and conspiracy. I'm going to tell you how that caused injury to the funds.

The three points I want to start out making about the instructions you received from the court -- and

I want to be very clear what I'm saying about the instructions -- is not the law, what his honor told you is the law.

I'm doing my best to point out to you three things about those instructions, but in the end you have the instructions and you should rely on what you read them to say, not what I tell you.

I believe it is accurate to say these three things.

First, the fund is not required to prove direct causation of injury by the defendants. You will hear in those instructions many times the words "directly" or "indirectly."

One of the elements of corrupt activity is that if there were damage, directly or indirectly, as a result of defendant's conduct.

The same thing is true with elements of conspiracy. This is not a case where the defendants mailed something directly to the health funds. This is not a case where there was some kind of meetings and they lied directly to us. We are not required to show that, nor to prove that they caused injury to us. We are allowed to do that proof indirectly.

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The second point I want to make, is that we are only required to prove proximate cause. Proximate is a

word that means foreseeable. That is to say, that injury to the funds was something the defendants could foresee would happen from their conduct.

And the third point, probably the most important point, is that we are only required to show that we were a proximate cause, and not the proximate cause. The instructions told you there may be more than one proximate cause. In this case, obviously, the most appropriate example would be the defendant's misconduct have caused, as we allege, smokers to smoke more.

You may also conclude, as fact, one of our witnesses told you from the stand, Dr. Harris, that smokers and their choices, individual smokers, also bear some responsibility, and their choices were another proximate cause of the injury to the funds.

The instructions tell you that those two proximate causes, one doesn't cancel the other one out. They go together. As long as each cause is defined to be a substantial factor, then each actor is jointly responsible for the injury to the funds.

The defendants are responsible for the injury, so too are the very smokers who are not here. You don't need to worry about that.

The one exception you have is if you find that the act of one actor broke the causal connection, the

instruction told you the second actor would have to be completely removed from the act of the first, and there would be no connection at all between them, and that the second act could not reasonably have been foreseen.

Our position, obviously, is that the tobacco companies sent out the kind of misinformation, the public statements that Mr. Coughlin was showing you for the last hour or so, they reasonably foresaw that those statements were going to affect the choices that individual smokers made, and that in turn injured the funds.

In the opening statements both sides, when they came to talk about causation, start connecting things. My colleague, Mr. Withey, was connecting dots, and defense counsel was connecting circles.

I rescued from the clip chart a version of the circles that were put up by the defense counsel, and I rewrote it. These are my words, not his, but I think it accurately portrays -- if we could put it up -- the gist of what defendants say we need to prove. We accept this. We accept that this is our burden of proof to prove this chain of causation.

Now, I will -- can you all see that all right? I will obviously acknowledge that. I'll be sure to read it. I would obviously acknowledge that this chain was put up in part to try to demonstrate to you that there is

a long distance between defendants' misconduct, which is written in the upper left circle, and increased costs to the health fund in the lower right.

But the four steps along the way, I think you'll find, are not very difficult steps. As the chain goes down, defendants' misconduct must be a proximate cause of people smoking more, including participants in these health funds. If you find that to be true, the

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increased smoking of the participants must be a proximate cause; or the next step, the increase in participants' disease. And that second step is what we all think of is the question: Does smoking cause disease, which we heard so much testimony about, as Mr. Coughlin mentioned, so many of the defense witnesses continue to deny.

But I think for most of you that will not be a difficult step, the causation chain, based on the evidence you heard.

The third step is if there is an increase in diseases, then that results in increase medical expenses.

And that was the testimony of Dr. Harris, but so far as I recall -- defense counsel may say otherwise -- so far as I recall, was unrebutted. It is a very common sense leap. We all know disease is expensive and it is going to result in medical expense, particularly the diseases associated with smoking.

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The last step in the causation chain is the increased medical expenses must be a proximate cause of increased costs in the health funds.

I don't think there was any evidence offered by the defendants to rebut the testimony of Professor Ghilarducci.

The health funds sits at the bottom of this chain, and they have no choice but to pay the smoking related costs of their beneficiaries. The health funds are there for smokers and non-smokers, that's why we have emphasized to you over and over this is not a case of smokers against the tobacco companies. The health funds have to serve the non-smokers who make up a greater portion of their membership than the smokers, and they have to do it with the money that's available from contributions. And those contributions are greatly reduced when increased medical expenses from smoking are laid at the fund's door.

Now, before we look at the first step of this cart, I want to briefly talk about that issue of proximate cause.

If we can go to the next document. This is Exhibit 1913, which is a Philip Morris memo from 1978 in which a Philip Morris's employee says, more industry antagonists are using an economic argument against

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cigarettes; i.e., cigarettes cause disease, disease requires treatment, major health costs are borne by the government, and the taxpayers pay in the end.

That's the same four steps we saw on the causation chart, with one exception; we have got the government instead of the health funds in this Philip Morris memo.

But if we can go to the next document, which is Exhibit 1831, you can see that the defendants anticipate that the health funds, they reasonably foresaw that the health funds were in the same position as the government, picking up their costs.

"I also was particularly interested in the reference of the double stake that unions have in reducing health costs."

The double stake is not only the individual union member injured personally by smoking, but the union and management health fund is also injured. That's what the double stake is. They knew that's who was being

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injured. They knew that causation chain was out there. The only thing that was keeping it from being brought in the courtroom was the fact that their documents, their misconduct, their corruption was not something that was publicly known until very recently.

Now, looking at the first chain in that, the

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first step in that chain, their misconduct caused increased smoking. This is where we called several witnesses to talk about how restricting information that's available to smokers results in greater smoking.

Who the defendants called in response was a history Professor James Martin, who said we didn't restrict the flow of information, it's all been common knowledge.

We can go to the next slide.

We called Professor Proctor -- I think you remember him, he's a history professor -- to testify that the judgment of history is that tobacco misconduct has been one of the longest running campaigns of deception in the history of science. He testified that it's had a very substantial impact increasing the consumption of cigarettes.

His point was, doubt is our product, that's the tobacco industry byline. They know that they -- that the way that they increase consumption is by -- and this is their words not ours -- "doubt is our product."

As Mr. Coughlin explained, they keep on putting out those public statements to keep getting people to doubt that there really is proof that smoking causes disease, and therefore the consumption of cigarettes remains higher.

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If we go to the next slide.

This is the -- we better go to the next one. Let's stay there. I'm sorry.

This is -- I put this out here just as one example of what the public statements were. What they say in 1970, that six years after the Surgeon General's report, there are eminent scientists who question whether any causal relationship has been proved between cigarette smoking and human disease.

They keep saying that over and over. And people reach out and grab that belief. That's what Dr. Davis told you, that's what Dr. Harris told you.

If we can go to the next line.

This is the consumption curve from the Surgeon General's report that was shown to you many times. And what it tells you is that smoking consumption is not a natural -- there is no natural level, it goes up and down depending on the information that is available. It goes up and down depending upon social forces.

You can see in the early half of the century smoking rose very dramatically. When the health scare came in the 1950s, it dropped precipitously. When these people got to go at the gentlemen's agreement. And in the health statement you saw from Mr. Coughlin, they jumped back again and turned it around. It rose again until

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1964, at the time of the first Surgeon General's report, and then it turned down again. And it's gone up and down since then, depending on various statements of what information was available to consumers, as Professor

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Proctor and Dr. Harris testified.

If we can go to the next slide.

Professor Proctor points out, by looking at that curve, simply, if you can move that curve backwards 10 years, you would have reduced a tremendous amount of smoking in this country. And that's what would have happened if the Surgeon General's report would have come out in 1954 instead of 1964.

Think of what the world could have been in 1954 if the defendants had simply told the truth, as they said they were going to in the frank statement. Think if, in conjunction with publishing the frank statement, they had published Dr. Teague's 1953 memo, Exhibit 18, that was shown to you earlier. The one where he concluded that smoking causes cancer.

And he lays out the case in a way that Professor Proctor said, as an expert, told you. It was very difficult for Professor Proctor to reconstruct 40 years later that it is a substantial impact. That's what we are required to show, a substantial factor in the increase in cigarette consumption was caused by the

defendant's misconduct.

If we can go to the next slide.

Professor Harris testified -- I neglected to mention one thing about that slide, too. Some point was made by either Professor Harris or Professor Proctor, that this smoking that went on in the 1950s, that was smoking, primarily that uptake of smoking that happened in the 1950s and 1960s, that could have be avoided if the tobacco industry the told the truth.

That's the injury that the funds are treating today. Those are people who started smoking when they were 12 to 17 in the 50s and 60s. Those are the people that right now, that these funds are treating for smoking related diseases.

If I could go to the picture of Dr. Harris.

Dr. Harris told you the same message. Information matters. He looked at it from a number of -- from the perspective of a number of disciplines. And he told you over and over again, information matters.

He said, imagine if the information that the tobacco companies had in their files had been available to the public?

We can go to the next slide. This is exhibit 287, in which BATCo indicated as a result of this, this is from 1962, the Surgeon General's report: As a result of

these various researches we now possess a knowledge the effects of nicotine are far more extensive than exists in public scientific literature. Having the effect on the consumption of cigarettes if that information had been public.

If we can go to the next slide.

Remember Dr. Davis came in and testified, Dr. Davis was the Surgeon General of Michigan for a while. He was the Director of the Office of Smoking and Health, the youngest director they ever had. He was the witness who was responsible for putting together most of the Surgeon General reports you looked at.

I think you can see he was a person who cares very passionately about public health, and he told you, we do put the message out: Yes, we try to tell individual

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smokers that it is dangerous. Yes, we try to tell them it will cause diseases. Yes, we try to tell them it's addictive. And he told you the message doesn't get through.

Remember why he said the message doesn't get through? Because of all the static that is put out by the defendants. They keep putting out those misleading public statements.

And he also focused you on the ads. He said, look at the ads that reassure smokers, that entice

smokers, that give people a reason to keep smoking, to think maybe those eminent scientist we have been hearing about are right and the case hasn't been proven. Maybe I can get success in sports and sexual fulfillment from cigarettes.

And these are the kinds of ads he showed you. I know you remember this one. This was a guy that I keep telling my wife I look like, and she says: There is no way, John.

And I think you remember the next one, too. This is the one my wife tells me she looks like.

But these ads are out there and they are out there for a reason, and they are part of the static that's going on.

Let's have the next ad, please.

This is the one they call the farmers daughter ad. I think when you get back to the jury room, I urge you to look closely at it. There is a girl on the bed in the window there, and I don't know how the tobacco companies can claim this is an ad about a 25 year old, because I do not know any 25 year old daughters who still live with their father's who chase away young men who may come to see them. This ad mocks the Surgeon General warning with the viewer discretion advised. It sends a message to the public, don't worry about the Surgeon

General smoking is fun, smoking has sexual potential for you. That's what goes out.

Now the defendants say, it's common knowledge., They say it's common knowledge that smoking is causing disease. It's common knowledge that it's addictive, ever since Mark Twain and King James.

If it is common knowledge, why do they work so hard to hide it in their own files? If it's common knowledge, why did these seven guys, the chief executive officers of the seven tobacco companies stand up in front of Congress in 1994 and say, I don't have this common knowledge, that later on we are going to bring in Professor Martin to tell you about, I don't think cigarette smoking is addictive.

At the bottom, it's just a very, very cynical thing that the tobacco companies try to pull over on the public. They come into court. They deny causation. They deny addiction. And then they want to take advantage of it and say but everybody knows.

Everybody doesn't know. There is a difference between what you know today and what you knew three weeks ago when you came in this courtroom.

Remember, I got professor Martin, probably the only question of mine he answered when I ask him: Doesn't what knowledge that is common change over time? And he

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says yes, it does. And he had to say that because we only learned very recently they manipulate nicotine. We only learned very recently their internal documents showed they always knew smoking causes cancer. That smoke was addictive way back in the 60s. We only learned this very recently.

Our knowledge has changed. They want you to sit in your chair and say: Boy, I remember when the Surgeon General warnings came out in the early 60s, so I guess everybody really has known about this.

But we didn't know and I tried to bring that point home by playing that Flintstones ad during Professor Martin's examination, just to remind you in the atmosphere of the 1960's you can still have a television show like that, a cartoon, and you can have people smoking. And you know that couldn't happen today. You know that would not be tolerated. And that's because the world has changed and was known, has changed. And the reason it wouldn't be tolerated is because what's come out of the defendants' filings.

We now know why that's wrong. We now know about the targeting of children that we didn't know in the 60's. So for them to say it's been common knowledge, blame the smokers is not fair, and it is not historically accurate. And that's what Dr. Davis was telling you by

showing you these ads.

Do they have a First Amendment right to run those ads? Absolutely. Do they have a right to put attractive models in their ads that my wife and I wished we looked like? Absolutely.

But it is wrong to run those ads and suggest to people that we are not pitching to you success and sports and sex, when in fact that's what they are doing. And it's also wrong to come into court and say, we are not affected, because of common knowledge.

Professor Martin didn't even want to look at the ads. He didn't want to look at the public statements with you. They are out there, drowning out the common knowledge.

Do smokers have some awareness that smoking is bad for them? Yes. But they get all these other signals, all this other static that causes them not to know, and our common knowledge, at least in the 60s and 70s and 80s, was very murky and very confused.

You know, I think I told you during one of the summations, a game I used to play with my children. My kids are here in court and they are a little older then when we played this game. But when they were younger, they had a keen interest of the change in my pocket. And I would pull a quarter out and say: Okay, we'll flip for

it. And I would flip it up and I would say heads I win and tails you lose.

And you know what, they never got one of my quarters. They got old enough finally to figure out the game, but I was just like the tobacco industry. I was playing a game they couldn't win. They come in here, deny addiction, deny cause, give the smokers the reason to smoke, and then they have the gall to come in here and tell you it is common knowledge, you can't blame us, everybody knew any way.

Maybe we did lie; maybe we did mislead. It

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doesn't matter, you all found out. We didn't find out. And it wasn't fair to smokers, it wasn't fair to the funds.

Let's look at the next slide. This is hard to read. I'll skip this one.

This is the transcript of the Chief executive Officer of Brown & Williamson, Mr. Brookes, who came in, and I think you recall how difficult it was for pages and pages, to try to get him to answer the question. He was the master of the game, he's still not going to tell you whether smoking causes disease or not.

Could we go to the excerpt from the Garfield testimony?

James Garfield is a trustee of one of the

health funds. His testimony was put in by deposition and was not read to you, but here is what he said.

He said, he was asked: You were aware at the time you were a trustee in the 1970's that cigarette packages had warning labels on them? I'm not sure it started in the 60s but I know it started, I'm not sure when it started.

And did you believe those warnings?

No.

You were aware, generally speaking, of the Surgeon General issuing reports on smoking and health?

Yes.

And when you heard about these reports did you believe them?

No.

Would you agree with me that it was commonly known that cigarettes were claimed to cause cancer in the 1970s and 1980s?

Oh, I wouldn't agree with you on that. You keep using the word "cancer" and I can't buy it.

Now that is just one guy, and I can't tell you that's proof about what is or wasn't common knowledge, but he is sort of the man-on-the-street. And the defendants say to you, come on, who would you believe on a question of smoking and health, the Surgeon General of the United

States or the tobacco industry? And they make it sound like, of course, everybody would know the Surgeon General's got to be right.

That's not the way it happened for Mr. Garfield and that's not the way it happened for the man on the street, generally. And the defendants knew that. This is their internal document from the early 60s, Exhibit 290.

From time to time, the man on the street interviews ask about the smoking question. In almost every one of these, there will be a quotation that is almost an exact paraphrase of some statement issued for the tobacco accounts.

That's from the CTR and TI. They know their propaganda works, and the reason it works because if you think about it, how do we get information in our society? Sometimes you get it directly, where it is nice and labeled, and it says this is from the Surgeon General and this is from the tobacco companies. But a lot of information you get second, third, fourth hand, and what they call common knowledge is something that doesn't get told to you, who the source is.

And so you hear eminent scientists doubt

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whether the smoking causation link has been proved. And you hear those words rattling in your brain, and you think there might be some truth to it. And the fact that it

came from the tobacco industry's propaganda machine is not something you know, and that's why the man in the street like Mr. Garfield gets confused.

And as the next slide demonstrates, when Dr. Davis was making his point about how hard it is for the public health message to get out, the red lines representing how much money is being spent on advertising and promotion to drown out the little green box of public health messages should leave you no doubt about why there is confusion and why it is not accurate to say that there was common knowledge that smoking causes disease.

Now, the next step in the link is that defendants' misconduct. We showed defendants' misconduct caused participants to smoke more by confusing them, by allowing them to believe that there was a reason to keep smoking, by drowning out the public health messages that might have been available to individual smokers.

The next step in the link that we have to prove is that the increased smoking was a proximate cause of an increase in participants' disease.

Now, I wouldn't have thought in 1999 this would be an issue that would really be contested in an American courtroom. We called Dr. Davis and he laid the case out for you. And if you are like me, I don't think I ever heard about this, how compelling that case was in 1964.

I'm just going to show three quick charts. I showed you this one, you remember? This is 114-B, that the more cigarettes you smoke per day, the more your cancer chance goes up.

Next. The more you inhale, the more your chance of cancer goes up.

And the younger you start smoking, the more your chance of cancer goes up.

As he told you, there is no answer to those charts and there never has been. The defendants called Dr. Carchman, and he talked for a long time and I never heard him address this point and there is no answer to why the dose response relationship, as Dr. Davis calls it, has this effect.

There is only one explanation. You remember Dr. Davis explained to you. It cannot be accounted for by air pollution or any other 20th Century industrial causes. There are no confounding factors that could explain why the younger you smoke, the more you get cancer; the more you inhale, the more you get cancer; the more cigarettes you smoke the, more you get cancer.

You don't even have to believe Dr. Davis about this point. You can believe the defendants' witnesses. The one guy who had the integrity to come in here and say yes, smoking causes disease. Dr. Rubin came in here and

he said that's right. Of course, he kind of had to say that because his textbooks says it. It says smoking tobacco is the single, largest preventable cause of death in the United States. The direct health costs to the economy of tens of billions of dollars a year, over 400,000 deaths a year occur prematurely because of smoking.

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That's their witness, not ours.

And you remember that defendants called Mr. Wecker, and I'm not sure I figured out what Mr. Wecker had to do with causation, but he didn't think it was 400,000 deaths a year.

Well, Rubin does, so they disagree on that, I guess.

But did it really matter? Does it matter if it's 400,000 deaths a year? Or 200,000 deaths a year? 300,000 deaths a year? I found that testimony incomprehensible on the point of causation. I don't know what it had to do with any of these links in the chain but it's really irrelevant to talk about whether the deaths are 400,000 or merely 300,000. The whole thing of denying causation is a legal game. This is what the 1976 document you saw before says.

1586. The public position of tobacco companies with respect to causal explanations of the association of

cigarette smoking and diseases is dominated by legal considerations.

The industry has retreated behind impossible demands for scientific proof, whereas such proof has never been required as a basis for action in the legal or political field.

Ladies and gentlemen, today we are in the legal field. All that mumbo jumbo you hear from the stand, from the witnesses they paraded in here that deny smoking causes disease. Is not applicable here in the legal field, that's been proven well beyond clear and convincing evidence.

If we can go to the next line.

The third step in the chain, I forgot to mention was the one that I talk about briefly that increased disease causes increased expense.

We all know that as a matter of common sense, and Dr. Harris was unrebutted, the latter stage is the one Professor Ghilarducci expressed, the increase in medical expenses caused increased costs to the health fund.

Now she was unrebutted. We heard no witness to come in and say that she was wrong with she said, the health funds have no choice but to cover their members.

The health funds can't do differential rates like a private insurance company can. They don't charge

rates, and they don't have a way to control the behavior of smokers who are changing from employer to employer anyway.

She said, and her uncontested opinion was, the funds have not been derelict with respect to adoption of smoking cessation programs. And she explained to you the delay in the availability of smoking cessation programs in this country can be laid at the doorstep of the tobacco companies. They held off for 25 or 30 years the recognition that smoking is an addiction. And by holding off, Professor Ghilarducci told you that delayed identifying cigarette smoking as a disease until it was identified as a disease, there was no treatment, there was no protocol for any kind of smoking cessation program. And she told you the protocols haven't been on line until the last year or two.

So here come the funds now, they finally have a chance. There are some smoking cessation programs that

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are just becoming available and Professor Ghilarducci told you the funds are still constrained by two important things. They have a fiduciary duty to their members, which requires that they be very, very conservative with the use of money. They are always the last ones with wellness programs and prevention programs for a reason. They have to see a track record before they go and spend

this money which would otherwise go to pay families of working people's health benefits, before they spend it, they have to know the program works.

And the other reason that they are cautious about using the money, they are very strapped for cash. She told you these funds just don't have a lot of money.

Now you saw evidence in the cross examination of Professor Ghilarducci about one fund that has a 94 million dollar research. And I'm sure you are going to hear about that from the defendants on closing.

That, ladies and gentlemen, is a pure red herring. Listen carefully. They talk so much about context, listen carefully if they give the context for that number. If they tell you how many months that represents for the reserves. If they tell you how much that fund's reserves were just two years earlier. If they tell you whether that number represents an unusual situation in investments for one year. If they tell you whether that fund anticipates in the same document, where they find the 94 million, a 15 million dollar loss the next year.

Listen carefully and see if the defendants give you the context for that, or if they just try to suggest to you this fund is delinquent for not adopting smoking cessation. I think you will conclude the fund was not

delinquent.

Professor Ghilarducci told you, and her opinion was unrebutted, she told you these funds face one serious problem -- and there was no testimony from the defendants on this point -- that retirees are going to be coming on line for these programs, and it's a huge expense, and the actuaries have to know what to do, if this money could be spent for smoking cessation and if they can do it, they will do it. Because they have one purpose and one purpose only, and that is to improve the health of their members and pay health benefits of its members.

The last point I want to make, in order to keep my time commitment, is the point about reliance.

You heard about reliance in some of the trustee depositions that were read to you. The question was asked: Did you, sir, rely upon anything that the tobacco companies said? Did you rely upon any information from the tobacco companies?

Professor Ghilarducci explained why that is the wrong question. And she showed you this chart that the trustees might not be aware that their fund indirectly relies upon information from the tobacco companies? The trustees simply don't know it, because they are not part of that information chain.

So it's not a fair question, she said.

Now, an effort was made during the defense case to attack the concept that this chart illustrates that the tobacco companies were supplying the information to the

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medical community. The suggestion is that the medical community doesn't list the tobacco companies, and it's that argument again about if you are a doctor, who do you listen to, the Surgeon General or the tobacco companies?

But remember, ladies and gentlemen, the evidence that Mr. Coughlin was showing you, who are the tobacco companies? They are this enterprises, CTR and the Tobacco Institute. CTR talks very directly to the medical community.

A distinguished doctor, Dr. Rubin came in for the defendants and said CTR was wonderful, they have four Nobel Prize winners. They do great work. The medical community does listen to CTR and CTR was part of sending out the false message about smoking and health that delayed the recognition by the medical community. It delayed the 1964 Surgeon General's report. It delayed the labeling that smoking is an addiction.

CTR and the tobacco companies have been right in there causing that to happen. They have blame for that as much as anyone. For them to say they have no path to the funds is not accurate.

Also if you read the reliance instruction

carefully, I think you will find that you are allowed to find that there has been reliance, if the beneficiaries rely -- and those are the individual smokers that we started out talking about at the beginning -- the individual smokers have unquestionably been affected by the misleading statements that the defendants made.

They have been enticed into smoking when they were kids; into using a product that's addictive before they had any chance to know what they were getting into, and before many of us had any idea it was even addictive.

Now they are smokers, now the tobacco industry wants to blame them. We urge you, as you apply the causation instructions, to recognize that you can blame the individual smokers to some degree, but that the blame in this lawsuit, in this courtroom belongs with the parties who have never accepted the blame but who are the prime movers of this, and much more than a substantial factor, the tobacco industry.

Thank you.

THE COURT: We are going to take a lunch recess at this time.

Over the noon hour -- we are going to stand in recess until 12:40 -- the same rules apply. Don't talk about the case among yourself nor with anyone else; don't form any opinions or express any. Stay away from -- there

are a lot of people in the courthouse today, stay away from conversations. So don't get yourself in proximity to somebody who's, you know, maybe talking about the case in one fashion or another.

So until 12:40, we'll stand in recess.

Would the attorneys approach once.

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(Luncheon recess.)

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TUESDAY AFTERNOON SESSION - MARCH 16, 1999

THE COURT: Please take your seat. At this point in time, I'll call upon the defendants to make final argument.

CLOSING ARGUMENT ON BEHALF OF THE DEFENDANTS

MR. BERNICK: Good afternoon. You have been called on to resolve an issue. It's an issue in this case. That's why we are here is this case.

Now before we broke for lunch, counsel for the plaintiffs was good enough to revive some of my drawings from opening statement, and they got marked up a little bit. So I've done my best to reproduce that chart right here. And this chart does reflect the issue in this case. The issue in this case is, have they shown wrongful conduct in accordance with what the court now has given you as instructions? Did that wrongful conduct cause the plaintiff funds or their participants to, for there to be more smoking, increased smoking beyond what would have been? Have they shown an increased level of disease in those participants, in this case? And has that increased level of disease carried with it an increased costs? This is the line of the issue in this case.

Now, this is what we talk about in opening, and they have been good enough to come back on closing and remind you of it. But the question is, what happened in

between the -- was this the case that they reproduced in-between, or was it a different kind of case? And that's what we are going to review for you here this afternoon a little bit.

I put some more circles on here and I'm going to fill in a different set of circles.

Circle one is sale of cigarettes.

Good or bad? Should it happen or should it not happen?

Does the sale of cigarettes increase disease around this country, beyond what it would have been without cigarettes?

Does that increased disease around the country carry with it an increased cost? What should be the policy here in the United States regarding the sale of cigarettes, the diseases that are associated with them and the costs that are associated with them?

That is not the issue in this case. We are not here to decide whether it should be lawful on unlawful to sell cigarettes, whether the sale itself is good or bad.

We are here to decide, was there specific wrongful conduct? The wrongful sale of cigarettes? And I ask you, which is the case that they have proceeded with, was there any such thing as a sale of cigarettes that they said was okay?

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Beyond what Mr. LeBow has done in the last two years, were there any sales in the 40s, 50's, 60s? Any brand any advertising campaign, anything that was okay? Or is the case that you heard, is this all bad?

Is the case that you heard that there was an increase of disease beyond what there would have been without cigarettes? Costs beyond what there would have been without cigarettes?

We are here to talk about specific acts in accordance with the court's instructions and whether they have traced through a causal chain beginning with those specific acts. That is the issue in the case.

There is a sea of evidence that you have now seen, think of this as the rock of relevance that you grab onto when you go through all these documents and consider all of the testimony. Always come back what is the wrongful act. They are complaining of does it comport with the court's instructions and have they traced it all the way through.

Now, the law tells you a lot about how to address this issue. The law tells you that they must frame their claims here in terms of specific types of contentions.

You heard a lot of the labels for those types of contentions in the instructions, but a lot of them boil

down to a handful of basic factual contentions.

Number 1, was there a scheme to defraud? The scheme to defraud, as you'll see in the instructions and as you have heard, the scheme to defraud would be a basis for a wire fraud or mail fraud claim.

Was there obstruction of justice or tampering with evidence? That could be another predicate act, a specific contention that they would have to prove.

Was there a conspiracy? Again a specific contention that they would have to prove. That's how the law frames your consideration of this issue.

And this afternoon I, and then others, will proceed in accordance with the law to review some of those basic contentions.

I'm going to talk about the scheme to defraud. Have they proved the fraud? Mr. Long is going to follow and he's going to talk about scheme to defraud, but in particular reference to CTR, the Council for Tobacco Research.

Mr. Lerman then is going to talk a little bit about advertising to kids. And you will see, as you may have heard from the instructions, well, how does that really fit in? Is there a claim that is really supported by the allegations of advertising to kids? But we are going to talk about that anyhow. Mr. Lerman is going to

talk about that. And then Mr. Weber is going to round up the presentation, he's going to talk about conspiracy and he's also going to talk about this issue of causation. How does all of this relate to causation? Has there been a harm and injury suffered by these funds and these plaintiffs in this case as a consequence of some wrongful act that has been proven up? That's how we are going to proceed.

Now, before we get into the scheme to defraud, I have a couple more comments about the law and the

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instructions that are more general.

First, credibility. You heard the instructions about the credibility of witnesses. It is your province, and your province alone, to determine credibility. Doesn't make any difference how smart those people are up on the stand, doesn't make any difference how distinguished their careers, you are the sole judges of whether you take or discard what it is they have to say.

You can conclude that it is not relevant; you can conclude that it's not helpful as expert testimony; you can conclude that you don't buy it because you think it is biased. That's credibility. That's your decision and yours alone.

Now, the observation that I would like to make beyond simply repeating what the court has said is to talk

a little bit about the sequence that you saw of the plaintiff's witnesses in this case.

We began with a group of people, Dr. Benowitz was one, Dr. Parran was another, even Mr. LeBow, and I want to come back to the tire people here in just a moment. But you saw a group of people, they took the stand, they testified on direct. And when they were cross examined, which is the principal way of looking at credibility, they admitted things; they admitted the limitations of some of their testimony.

I've got one as an example here. Remember Dr. Benowitz on this key issue of does it make a difference if it's addiction or dependence or habit? He says, the precise name that you put on it isn't the issue, as long as you recognize that smoking can be difficult to quit?

Answer, he says that's right. The labels don't make that much of a difference.

A very important point and he was prepared to acknowledge it.

Let's take Mr. LeBow, the wheel. It's interesting because, you know, before 1996 Mr. LeBow had his own little tire and it was rolling down the same road as everybody else's tire in this case, rolling, rolling rolling, and it went flat. And the reason it went flat is that his company wasn't do doing so well. He knew that

and he didn't become the nail until he reached a resolution of some certain cases, that's when he became the nail, because it was in his economic self-interest to do so. And he admitted, he admitted that he didn't have to pay a dime in order to resolve this case, and he was here as a result of agreements to cooperate.

So, is he a little tire or a little nail? He's still stepped up to what it is that brought him here to court. He was frank on what brought him here to court.

But then we had a different group of experts, and they were very distinguished people. They came in to talk about exactly the same things the others had talked about. Dr. Jaffe talked about safer cigarette research, but then Dr. Harris talked about safer cigarette research. Dr. Benowitz talked about addiction, but then Dr. Davis talked about addiction too. What was going on? Why was it necessary to bring these new people in and basically say the same kinds of things all over again?

Now, the second group of people were pretty distinguished; they were people involved in writing those Surgeon General's reports. We almost had this image of

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these very, very high powered people sitting around and crafting these books that are so detailed and specific and are the basis for framing the health policy in this country for health. There is almost an aura from their

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distinguished careers in crafting these documents.

You might draw an inference from that. You might draw an inference when they never gave up anything on cross examination. Maybe what they had been doing for the last several years, framing the public health policy, was also a reason why they are here in this courtroom. That they have an agenda, a public policy agenda, maybe even a very sound one. That goes beyond the issue in this case.

Maybe, and you heard this from Dr. Davis, he believes advertising should simply be banned when it comes to cigarettes. That's not before you. That's a question of policy, it's not an issue in this case. You also heard him say that he's not against the idea of maybe using litigation to increase the costs to the industry so that fewer cigarettes get sold.

Okay. Maybe that's his agenda, maybe that's an appropriate kind of thing, but does it leave you to wonder about his credibility when he addresses the particular issues that we have in this case?

So when you think about the witnesses and you think about credibility, think about why people are here, think about their backgrounds that bring them here, think about whether they are helpful in addressing the particular issues that we are about in this case of

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credibility.

Second basic legal point; evidence. All of the evidence.

After you get done thinking about credibility -- credibility is a filter -- you then have all this evidence, tons of evidence, use this as a touchstone, but then think about something else.

We have seen that there is a lot of focus on internal documents. Fair enough. We saw here again today, those documents raise questions, there is no doubt about it. We are not here to tell you that all those documents were good. We are not here to tell you all those documents represents sound thoughts, sound decisions, correct decisions.

They raise questions. They prompt inquiry. You might even be able to say, I can understand why a lawsuit might have been brought, quality of some of those documents, I can understand them. But we are not at the point where we simply have a lawsuit being brought, we have a trial. We are here not to talk about just a part of the evidence, we are here to talk about all of the relevant evidence.

Now, as you think about the cases, and you think about that fact, how much of that full picture, how much of the full truth did you hear from the internal

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documents as they were presented by the plaintiffs?

In opening statement, how much of the context for those documents did you hear, or is what you heard just document after document, question, question, question, problem, problem, problem? How much of the context did they supply when they called their witnesses

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on direct examination? How much of the context did they supply?

Q. And even today on closing you saw all the same documents trotted out there; yet again, those hand- picked select documents, as if nothing had ever happened in the case. Was that a presentation of the full context? Was that fair to the people who wrote the documents? Is that an adequate picture of what was going on at the time they wrote the documents?

The hallmark of their case, with what their case turns upon, what they are putting to you, is that those documents are not only the beginning, they are the end of the question, they are the judgment in the case.

The world is much more complex, you have seen much more in the way of evidence.

What is the hallmark of what we have done with those documents?

A. We have shown you the other documents. I'm going to review some of them for you here today.

B. We put the people up on the stand who wrote the documents and lived the history, and they were there at the time. And we said, tell the whole story.

Now, those people were open to cross examination. They could have asked them any question in the world about that history. How much cross examination really was there at the end of the day for most of those people? How many of the documents that are so key to their case were put up on the screen and said what is your explanation of that? Or is what we saw, they were still asked about some other documents they weren't personally familiar with. If documents are here and they should be here, they should be here for the way that they were written. They were written by people with hopes, aspirations and problems, leading their lives, trying to answer their questions.

Judge, the people on the stand judge my clients, judge the plaintiffs by the full compliment of documentary evidence. Don't just keep on picking up those pieces of paper and putting them out there.

Now, you will hear the argument. Well, why didn't we show our documents to our experts? And I think the observation was made at one point in time, geeze, because we don't want them to see what the truth is, we want them to kind of wear those blinders and not see the

full picture, we are scared of what the documents might show.

It would be pretty naive if we went into that. Pretty naive if we could somehow escape from those documents by not showing them to our experts. That's not what it was all about.

The reason we didn't have them shown to our experts is there is no way any expert can go back over that history and talk to you about it in a meaningful way. No way. The only people who can do that are the people who were part of that history, and they were brought in here to court.

Now, what happened when the plaintiff's experts try to play that game? What happened when the plaintiff's experts came in and was kind of laying your hands on the documents and -- oh, I can tell you when, what this means and what that means. Was that really helpful to you? I

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want to talk to you about a couple of examples.
THE COURT: Counsel, stay at the podium unless you are using the board.
MR. BERNICK: I'm sorry, your Honor.
Let's take a look at a couple of these. This was a smoking and health proposal. It was a document taken from our files. Smoking and health proposal was the subject of testimony by Dr. Davis. And you may remember

that he quoted from a part of that document where he said, doubt is our product since it's the best means of competing with the body of fact that exists. Remember that? But then it turns out that there were other parts of the document that pointed out, truth is our message and we have to work with well documented facts.
So we have one of their experts bringing a document before you and he quotes from part of it and he doesn't quote from the rest of it.
But it was worse. What else did he have to admit? Does he remember who wrote the document? No, not off the top of my head. Whose files did it come from? I don't know. Do you know whether it was actually issued within the company from whose files it was produced? I don't know.
Well, did anyone actually do any of the things that are listed? I don't know.
How helpful is that? How much does that provide the context? How much of that is the full truth as opposed to just pulling out that piece of paper?
Remember also, Dr. Davis was the guy who had that photograph, he said it was an ad, that it showed Willie, remember Willie, with the kid, this little cute five year old reaching for a movie or making, shaking Willie's hand. And it's pretty suggestive and pretty

powerful.
It turns out that wasn't an ad, that somebody had wheeled a cardboard cutout of Willie over to the ad and taken a picture, and this prestigious guy, Dr. Davis, he shows you the photograph, he doesn't tell you any of that. He doesn't even know where the photo came from or why it was taken, or by whom it was taken. He just comes in the court and up it goes.
How helpful is that in understanding documents? How does that really reveal what the facts are? You have then Professor Proctor. Professor Proctor also had the same issue. Well, let's deal with project Airbus. Project Airbus and project Aerial. This was Jaffe and Harris, both Jaffe and Harris.
This was the project, one of the projects that they said was a potential safer cigarette and was never pursued. And again they used historical documents in order to bear this out.
But it turns out that project Aerial, that was pursued in the 1960's, ran into problems in 1966. This was written in 1966, its a plaintiff's exhibit. It says the devices which have been made are still a considerable way from being acceptable and easily produced, and it would be misleading to underestimate the amount of effort required to develop the devices to the required

acceptability, both in smoke quality and production.
Then it turns out that Dr. Jaffe didn't know

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anything that could have been done at the time to resolve those problems. Didn't know how to resolve that difficulty back in 1966.

Then you had project Airbus. Project Airbus tried to take the aerial concept back in the 60s and revive it in the 80s, and it ran into problems. It ran into the problems with the kinds of materials that were being used. Once again, Dr. Jaffe didn't know how to resolve the technical problems with project Airbus. He didn't know what the answers to those problems were. And by the time it got to Dr. Harris, who talked about exactly the same documents and the same facts, what did Dr. Harris have to admit to you? Have you ever looked into what happened to project Airbus to see whether it ever became a feasible design concept? Answer no, I can't remember looking specifically at Airbus documents.

When you bring the document in, when you trot out these documents and recreate history, look what happens to the experts. Are they really doing anything more than what the plaintiff's lawyers are doing in pulling the documents out, putting them up there and saying see, isn't this a problem?

We declined to do that. We brought in the

company people to talk about the company documents, we brought in the experts to talk about the science.

Let's get to the first contention about wrongful conduct, which is the scheme to defraud. And that's what I'm going to talk about is the scheme to defraud.

40 years of time are at issue here, they go back to the early 1950s. And I ask you now, as you sit here, after all of this testimony and all the experts have spoken, if you were asked what's the scheme to defraud? What's the master plan? Could you really articulate it?

They brought in economists, they brought in historians, they brought in addiction experts, they brought in doctors of all types to somehow tell you about this master scheme to defraud. What was it? What was that unifying element that carried throughout 40 years that everybody in this entire industry, making every single cigarette, paid all, clinged to all, to succeed in accomplishing? I don't think you can identify it.

Now, there is a basic story of what occurred. We are the ones who told you. The basic story is almost, it is completely unrebutted in its basic structure. What is the basic story here that does take us back to 1954?

Let's begin with the frank statement. Again where they again -- here it is. Frank statement to

smokers. Let me focus on a couple of things.

TIRC. There was a reference incidentally to the fact that somehow oh BATCo was a party to this statement. It was not. These were U.S. manufacturers of cigarettes.

If we can go back to the -- let's see. We go back to the title, we can see that the frank statement contains a variety of statements. I'm going to focus on a couple.

You will see back over here that there are some specific commitments that are made. These specific commitments to do CTR are going to be discussed by Mr. Long. I'm going to talk about another part of the

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document.

I'm going to focus you on the statements that were made right here. We accept an interest in people's health as a basic responsibility paramount to every other consideration in our business.

That's a pretty powerful statement. I could tell you that there is no evidence that anybody who's a participant in these funds ever saw this document, ever read the document, that none of the trustees ever did the same. But I'm not going to focus on that for right now, I'm going to talk about the commitment that we made and what we did about it, because it is our basis. And had it

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said here, a responsibility paramount to every other consideration, and the suggestion that has been made is that this meant that there was a real conflict, that we had to choose between our responsibilities to our customers and our commercial interest.

The fact of the matter is, that choice was not necessary for a very simple reason. Our marketplace. Back in the 1950s, as a result of this information, our marketplace was completely conditioned by the health and safety issue. In order to sell to the consumer, in order to meet consumer demand, we had to address the issue of smoking and health. There was no conflict. There was only one path, which is to figure out what to do with our product to meet the demands of our consumers, of our customers.

The story of how we satisfied the paramount obligation is the story of product development. That is the basic story in this case, and it's completely unrebutted what we did to satisfy those obligations and pursue product development.

Number 1, we did the chemistry research. You heard the testimony from Dr. Townsend. He talked in part about the effort to reduce constituents in smoke that were felt to be potential culprits, that were felt to be potential sources of increased risk. But then it turns

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out every time you identified one of those elements, a study would come out that said, guess what? Benzpyrene probably is not sufficient to produce the type of activity noted in our animals, it is not the right way to go.

That was the problem with the chemical research, it didn't consistently produce an indication of some material the scientific community was saying was a cause of smoking related illness.

Selected filtration didn't pan out. Then we went to biological research. You have heard the story of biological research, how different tests were used in order to provide an indication of what might be safer.

Mr. Read told you about mouse skin painting and the extensive activities that were undertaken in that area. The basic problem was different tests gave different results. There was an extraordinarily difficult time in getting an agreement on any one test, and there ultimately was never an agreement on any one test.

And the ultimate solution, after we looked at chemistry and after we looked at biology, you have heard this before, it was to reduce the overall deliveries of smoke. And this was done with a vengeance, it was done aggressively and done consistently. And that trend, those moves, those changes, are completely without dispute in

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this case. Those are measurements taken in accordance

with FTC mandated methodology, and they represent real progress in the product.

What did Dr. Benowitz say about this? He says, I agree that these moves were all encouraged by the scientific community. We went along with the recommendations that were ultimately made.

Now, I want to get to the question of what the plaintiffs say about some of these efforts.

We don't see an answer to the overall story. We don't see them saying that this is wrong, but what we see them do is to go back over 40 years and take out issues and hold them up for you. This is one of them. This is the so-called gentlemen's agreement, its a statement out of the documents.

I'm going to go through some of those issues. I won't have nearly enough time to cover them all. I'm going to talk to you about what our answers are to these issues. And I'm going to write them right here on the board, but as I do I want you to ask yourselves two basic questions.

Number 1, have they given you the whole picture? That's number 1, have they done that? And number two, is this really a scheme to defraud? Not whether it was a mistake, not whether more could have been done, was it a scheme to defraud somebody? That's the

contention of this case.

What's the first claim? The first claim is the claim about reluctant researchers. This is the claim that said, in order to protect the conventional cigarette business -- we didn't really want to go ahead and do research, we were afraid it was going to undercut that business; that's the claim.

You may ask yourself, what sense does that claim really make? If we really wanted to protect the existing business, why should we do research at all.

Q. Why should we spend all this time and money, why should we hire people like Dr. Townsend or Dr. Carchman? Why should we hire people like Mr. Read? Why should we do that if we really wanted to protect our business? What sense does it make?

Does it make any sense in terms of what the marketplace was like? This is the scope of published research. There are tens of thousands of research projects being engaged in all over the country. Is there any way that we could really control those? Does that make sense at all?

Indeed, the research was taking place around the world. How would our reluctant researchers have any impact really on anything? What was the answer to that question? And who were the reluctant researchers? Was

doctor Dr. Townsend reluctant? Was Mr. Read reluctant? Was Dr. Carchman reluctant?

Were they somehow holding back? What you saw, as this team were pursued on the basis of a document here and a document here, is that the research got done. There was biological research at BATCo. It came over here to the United States. There was biological research in the United States done in connection with the tobacco working group. There was biological research done at Reynolds.

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There was there was biological research done through Philip Morris, all kinds of biological research. Why would it have been done if all we wanted to do was to protect the conventional cigarette business? And as that evidence emerged, you saw emerge holes in the testimony of Dr. Jaffe.

We talked about the gentlemen's agreement.

He couldn't claim that there was an agreement not to do biological research from '53 to '64. He said, I don't know if that was one hole. Then he also admitted what about BATCo? I don't know that they restrained their research.

Then what about Premier? Was he aware of the fact that there was a biological research for Premier? He wasn't aware of that.

And finally, this was the most key. Do you

really believe that it was clear that the industry somehow could control all of this research being done around the world?

Question: And they could not control the research activities and the publications of others on the issue of safer cigarettes, correct?

Answer: That's correct.

The world was far broader, the research was far more extensive than anybody could control. Reluctant researchers, hardly squares with the facts. And where is the scheme to defraud?

We then get to marketing. The next claim was, muzzle marketers. This was the claim that said, we wanted to protect the conventional cigarette business, so we all agreed that we would not make claims on the basis of smoking and health in marketing new developments. We would hold back on that kind of claim. Remember that being said?

Again, ask yourself, what sense does that make? Here companies spend tense and hundreds of millions of dollars to develop new products, products like Premier or products like Next or, God bless if we had ever succeeded, products like Airbus Bus. We invested all this time and all this money, and then we turn around and say, oops, we are not going to talk about it. Why in the world would

anyone want to do that? What could possibly account, if we were going to do this, why try it all? If all we wanted to sell was unfiltered cigarettes back in the 1950s and we were not going to boast about what we developed, why develop anything? What's the point?

In point of fact, there is only one explanation that you heard for why it is that the marketing couldn't make claims about smoking and health. It wasn't that we didn't want to, it's that we couldn't. The FTC guidelines said we could not. And boy, those guidelines, they were a hot potato.

Doctor Jaffe, when he testified, mentioned them, but ultimately he had to concede. Let me get through a couple of other things here until we get to Dr. Jaffe. Here we go. He had to concede that he was an expert in the FTC guidelines. He couldn't talk about them. He was an economist not an FTC expert.

Then he had Dr. Harris. And Dr. Harris took the stand and talked about the same thing. But did you even mention to them -- this is cross examination -- did

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you even mention to the jury in direct examination, during the entire course of your direct examination, that the FTC commissioned guidelines governing cigarette advertising?

Answer: I didn't mention that. I mentioned FTC, but I didn't mention any at all about the guidelines

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at that time.

You have read those guidelines haven't you?

Yes, I have.

He didn't want to touch them with a ten foot pole. Dr. Scheffman -- Dr. Scheffman actually worked for the FDC. He was Chief Commissioner for the FTC, and he studied its regulations, after cross examination, after Mr. Adelman went very ably after these guidelines. Let's tell it like it is. Nobody wanted these companies to make claims about health and cigarettes, ever, ever, ever. It was off limits.

Let's get real. That's why the marketing was muzzled, it was muzzled by the FTC. We wanted to market it.

Then they turn around and say, gee, not that you marketed too little, but that you marketed too much.

What about these ads that played in the 70s that said, gee, why don't you switch down rather than quit? Why could we do those and not the others?

Well, it turns out that the public health community -- this is on the Surgeon General's report in 1981 -- had all kinds of cautions and all kinds of qualifications. But in this case, when it came to reducing delivery, the public health community said, if you can't quit, if you can't quit, you should switch down.

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So those ads were okay with the government, they could run. But the ads that wanted to do what they said we should do, they couldn't run.

Maybe it's not muzzled marketing, maybe it is muddled marketing. But the muddled marketing is not something of our creation, it is a function of what we are permitted to say.

What was the third on the list? The recent revelations, you hear it again and again and again. Well, now we know, it's now coming out. There are now documents that say, how much have you learned from those documents? What were the recent revelations?

Well, one was, reference to our historical documents, indicating this is an interesting one. That the documents were written back in the early 1970s, that pH levels were going up, and the reason that Marlboro was so successful is that pH had been raised, ammonia had been raised, free base nicotine -- remember free base nicotine? You heard about that again today. All based on the historical documents.

The interesting thing about this one was the same document that talked about Marlboro, talked about Kool. And Kool is a product that my client makes. And they say in this document the pH is going up with ammonia. We didn't even have ammonia in our product in the early

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1970s, that pH wasn't a function of ammonia at all, it had nothing to do with ammonia.

What ultimately happened with pH? This theory that when you change pH the nicotine and the free base nicotine increases? Well, ultimately, it turns out that

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Dr. Benowitz, who offered this theory on the Winston or anything else: Any other pH test they did, did you go beyond that memorandum to see what was available that year?

Answer: That year, no.

He never actually did a thorough review of the data on pH, he never actually figured out, has there been a big change in pH? What about free base nicotine? Well, then he was confronted with the fact that studies have now been done. This is a study done for the state of Massachusetts.

These are the average pHs even in the last few years. If you take a look at the best selling brands, Marlboro and Marlboro Lights, they were at 6.O and 6.1. He couldn't even say there was a significant difference between any of these pH levels. He couldn't account for sales on the basis of ammonia or pH or free nicotine.

And then were those pH levels taken in 1996. Any different from the ones back in the early 1970s? Had there been a change in pH because ammonia was being used?

The answer to that was no.

Back in the early 1970s, cigarettes made from bright tobacco or blended tobacco delivered mainstream smoke of pH below 6.2 and, consequently, contain only small amounts of unprotenated nicotine. The results you just saw in Massachusetts are almost exactly in the same range. Over the past 30 years there has been no change in the pH, no change in ammonia, free nicotine.

Now, in 1962, it was an inconsequential part of smoke and hasn't changed since all those theory about the manipulation of nicotine, pH free base. Where is the data? Where is the data? Or is this just a function of pulling out that 1973 document?

Then there was the claim, let's get to this one. Remember, it was said here this morning, what about that research that was done before 1964 about nicotine and addiction? That wasn't sent to the Surgeon General; another revelation.

You were quoted this document here, this is 19 -- February 13, 1962, the effects of nicotine proposal for further research at Battelle.

And this is the one that says, as a result of these various researchers we now possess a knowledge of the effects of nicotine far more extensive than exists in published scientific literature.

Remember that? Pretty powerful. We knew more than everybody else, and they strung that together with a lawyers' document written a little bit later that says, moreover, nicotine is addictive. We are then in the business of selling nicotine.

And they suggested we know more, lawyers are wise to it. They suggested that the decision was then made to withhold disclosure of the Battelle report to the TIRC members or SAB until further notice. And ultimately, it was never sent to the Surgeon General. You heard that reiterated this morning. Scientists know this now. Lawyers don't like it. Lawyers cut it off at the path. That was the claim.

Recent revelation? Just one problem. They only gave you a part of the documents. It turns out that there was an appraisal that was done in-between the time

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of the original statement by the scientists, and the later decision not to send the reports, an appraisal not done by lawyers, but by scientists. This was it.

This says, Dr. Lieber was one of the investigators for this work, agrees with this criticism. And it is extraordinary that a scientist can report on a series of experiments, and when questioned about their validity, admit that they were not properly carried out.

The appraiser came in, he interviewed the

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people at Battelle, and they admitted the problems with their research this great research that had been done. What was the bottom line conclusion? The information of these reports is not sufficiently complete to justify any form of publication, June 21, 1963. That was the assessment of the scientists, not the lawyers.

And there was a second telex. This says that, incidentally, Dr. Benowitz has no basis to disagree with the appraisal. There was another telex that they didn't show you. This is the telex that actually reports the decision not to turn the research over. It doesn't talk about lawyers making the decision, it says, TRC consultant scientists advise it is too early to submit Battelle reports to the Surgeon General's committee, but we think they will agree -- that is the scientists -- that continuation by Battelle of this work would be useful.

Charles Ellis, the internal scientist who was the biggest proponent of the Battelle work, the one who wrote all the glowing things, he convinced of beneficial effects of nicotine, but agrees further investigation desireable before publication.

Every single scientist signed off on the idea that the research was not of sufficiently high quality to justify release.

What about that memo by the lawyer? It was

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after the fact. That's dated July 17 of 1963. So once again we get the experts who take the stand, they pick out what they want. They are telling you about these documents, they are telling you the history, saying they have got the full truth here.

What about the statement that, you know, it also turns out that more information was transmitted to the Surgeon General. This is dated March of '63 to the Surgeon General. It is in evidence. And a lot of the effects that were observed by Battelle were picked up by other articles reporting on the same effects, and they were sent to the Surgeon General in March of 1963. Nobody was concealing the effects of nicotine.

What about the fact that the word nicotine and addictive is used in those documents before the '64 report? Was there some secret that nicotine had addictive properties?

Dr. Benowitz admits that there were people in the scientific community who expressed the view that nicotine was addictive before 1964, and he's right. There are articles in evidence, this is one, that specifically talk about the addictive aspects of heavy cigarette smoking before 1964.

Here is what they say: Heavy cigarette smokers thus appear to be true addicts."

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And this article not only came out before '64,

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the tobacco industry sponsored it's publication. Where was the secret? What is the significance of this new and terrific revelation that's taken place?

Vent blocking. Remember the people cover over the vent holes and it means that they get more nicotine and more tar? We had to introduce the evidence and the data that says that's not a problem, and it's been studied why were they telling you, why weren't they telling you about that kind of research? What about the claim that somehow we are in the pharmaceutical business? Remember that one? Gee, these companies are in the pharmaceutical business.

Well, it turns out the reason we got into the research of looking in the pharmacy of nicotine was that the National Cancer Institute scientists asked us to do that, as did the Surgeon General of the United States. These are minutes of the National Cancer Institute meeting. We are there, and people from the National Cancer Institute are there.

Cooperation with the government. This was a cooperative program pursued for 10 years. Surgeon General says, we should look at cigarettes with altered nicotine and tar ratios.

Moving to another category. Anxious attorneys.

I'm not sure everybody can see. It says anxious attorneys. A lot of those are around. Especially today.

A lot of evidence that's been suggested to you about anxious attorneys, attorneys who were too active, too involved, people who have got documents that pertain to that subject, not only myself but others will address.

I'm going to talk to you about a couple incidents that relate to my client, because I think what you are going to see, once again you have to look at the whole truth, all the evidence, before you come to easy conclusions.

There was the document here, this is the Harrogate program. Remember the tobacco industry in Britain set up a research program in England at a lab called Harrogate. This is where mouse skin painting work was done.

Mr. Read testified about it, and there were documents that you saw where lawyers expressed concern about publication of the results, from the results of the Harrogate research in Britain. This was one of the documents. Then it turned out, lo and behold, that the Harrogate results were published in the British Journal of Cancer, and in fact, they made specific findings that were favorable to mouse skin painting that is intended to confirm the value of mouse skin painting research. It was

published in peer review journals, and the findings that were made were exactly the findings that the lawyers had earlier expressed concern about.

So, yes, the lawyers are anxious, they are worried about what's coming up. But did it go forward as research, yes, it did. Was it published? Yes, it was. Was the publication true to the research and unfavorable to us? Look at the lawyer's own documents. Yes, it was.

Again, all the documents need to be looked at in order to ascertain whether the one that's been picked out is a fair representation.

Here is another one. Remember the issue about

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whether Brown & Williamson got the BATCo research reports? Remember that one being pursued? Another one -- well, BATCo says, doing all the research, but did we get it? And they showed you documents suggesting that somehow, this is 1979, it was necessary to maintain these documents in the Law Department and claim that they were privileged and protected. Remember that?

But it turned out that the plaintiffs own documents, six years later, showed that those research reports, and this is a very poor copy, talked with Earl Kohnhorst something about the scientific documents are in the R&D Department now.

This was the document that was introduced to

say, gee, were they shipped abroad? But it turns out they are not in the Legal Department, they are in the Research and Development Department, where they belong.

Now, they said, well, gee, this is 1985 and doesn't -- this document proposes sending the research reports back to England. And remember I asked their witness: Do you know that they were sent back? This is Dr. Harris. Did you look into whether they were really sent back, or are you just referring to a document? He couldn't answer the question.

In fact, the whole situation was audited. An audit was done comparing what BATCo reflected that we got at Brown & Williamson, and then compared it with what was actually in the library. And these are documents that are in evidence that shows from 1957 to 1992 there were no less than 1900 reports that were sent over. Only 94 of them in that whole period of time can't be located. And if you take a look at the period of time after November, '79 which is the date of that memo, only four out of 478 reports can't be located.

Are they somehow incredibly sensitive in their topics? They are a bunch of things. So again, the claim is made, not borne out. Why do we continue to see these documents used on closing?

Finally, I want to come to the issue of the

public position of these companies on causation.

All of these issues are issues that you have seen, that you have seen addressed. None of them, A, are true, B, even begin to rise to the level of a claim that there was somehow a scheme to defraud, that somebody was misled.

We have shown you the answers to each and every one of them. You have seen us pop up and do it during the course of the trial; we'll continue to do it. These are serious questions raised by the documents. We step up to that fact, but we believe when you take a look at those facts, including claims when they are saying attorneys were running the show, we know that that gets people excited.

Look at all of the evidence before you come to your conclusion. Think about those people who took the stand for the companies, and we were prepared to address it all.

Let me talk a little about the company's public position.

Just got to keep track of my time here because we have an allotment of time.

The company's public position is a matter of

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importance in this case, and it is a matter of importance beyond this case. They are using it here to suggest that

after all that was done in the way of product development and research, all the steps that were taken to make sure that our advertising was right, that all of it should basically be set to one side because of what was said publicly about the issue of causation. Somehow it just wipes the slate clean of everything that's been done since 1954; nullifies it all.

I want to talk a little bit about what this position was, why we took it, and the support that we have for it, and whether in some fashion it rises to a scheme to defraud anybody after 40 years of intense public scrutiny.

What was the position? Well, you have seen the plaintiff's experts characterize the public position. Remember the fluid testimony of Professor Proctor? He said, gee, if you take a look at it, we have said perfectly safe. Remember his testimony, cigarettes, repeatedly perfectly safe. Never said in the context of the documents that we are talking about here after 1954. Where is the evidence we said the stuff was perfectly safe?

If you take a look at the frank statement itself, and I think I will get there on the screen. We say we believe the products we make are not injurious to health. That's what we said in 1954. Even that went

further than what emerged as our position. After 1954, after the frank statement, the position that was taken by this industry is not that cigarettes are safe, certainly not that they are perfectly safe, not that they are not injurious; the position that was taken was, that there are gaps in what has been known and developed in the science, and that those gaps are significant gaps. That is the position that's been taken.

And I think if you take a look at the documents you will see, first of all, that in 1954 when we made this statement Dr. Jaffee was prepared to recognize that there was an honestly held belief at the time. That was his testimony.

After the statement was made, this is a statement of 1954 after the frank statement. We are no longer saying not injurious, we are saying statements of a definite and final nature concerning the relationship, et cetera, are at the present time premature if they leave the impression of conclusive and complete coverage of the relationship.

Since 1954 a whole series of statements have been made. We are going to talk about them here in a minute. But this is the essence of the position that's been expressed. Sometimes the position has been very clearly stated. The question about smoking and health is

still a question. It is basically a statement about things that are not known other times, and we'll step up to it. There were statements why we are dropping the New York Times, and the text of this went too far. And I think we had said it went too far, but it was isolated. The basic position is the one that is expressed here, smoking and health is still a question.

You heard in this courtroom basically the same

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testimony. Is it an easy position to articulate? No. It's not a clean yes or no answer. People who want to know does it or does it not? It's not the kind of answer that we have.

And we stepped right up to it, you heard it from the stand, you would hear it again if you asked again, it is a statement about the state of science is important. Why? Because we have to deal with modifying the product, and until we know the constituent of smoke that's involved, until we know the mechanism that's involved, we are shooting at a moving target. It's a fact. We would love to change that fact. We haven't figured out how to change that fact in 40 years.

Do we minimize the risks that are associated with smoking? We do not. Nobody took the stand to say that the risks of smoking are somehow minimal or inconsequential. The Surgeon General of the United States

handled public health policy. Nobody took the stand in this courtroom to say that somehow what the Surgeon General is doing is wrong. All we are saying is a statement about the science.

Do we have support for this statement? The support has varied over time. Back in the 1950s we had some support from people who were independent of the industry. I don't have time to review it all. But before the 1964 report there were a variety of scientists who believed, as we did, that there was still an open question. Remember on cross examination of Dr. Proctor I showed you the statement of the Surgeon General himself in 1957, saying, I can't go further than to say that the evidence strongly suggests -- remember that? Not prepared to make the statement that it had been established, 1957.

By 1964 the matter was still controversial enough there had to be a cigarette report. And the cigarette report itself said this matter is still controversial.

Let me pull that up for just a moment.

This is the 57 document, because I'm not quite there. This is out of the '64 report. The causal significance of an association is a matter of judgment which goes beyond any statement of statistical probabilities.

So we are talking in 1964 about a judgment, was that somehow a slam dunk even in 1964? Read on. Various meanings and conceptions of the term cause were discussed vigorously at a number of meetings of the committee and its subcommittees. This remained a subject of debate even in 1964.

In order to resolve this issue what had to happen? They had to adopt -- this is doctor Proctor himself testifying -- they had to adopt a whole new test of causation in 1964 in order to reach the conclusion. A whole new test of causation.

So from '54 to '64 there were not only independent scientists who were saying it hasn't been established, but even as of '64 the test was not there in order to say causation; they had to develop a new one.

What's happened since 1964? Well, you have a different judgment made by the Surgeon General in '64, but the gaps still remain. Where has there been anybody who has taken the stand for any side, I can tell you the

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constituent of smoke that causes disease? Nobody's done that.

Where has anyone taken the stand that says I can tell you the mechanism by which causation takes place? Nobody has done that either. These are unions, they remain a fact, and they affect our business. And we point

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them out because they are accurate statements. Not a single one of those statements has been disputed in this court.

THE COURT: You used an hour.

MR. BERNICK: I'm sorry?

THE COURT: You have used an hour.

MR. BERNICK: I'll conclude in five minutes.

THE COURT: Doesn't matter to me.

MR. BERNICK: What is it why we are doing this. Why is it so critical and of such great importance that we do this causation position. Some people have said and pointed out, there are documents that talk about, gee, it's all a question of legal position. It's a question of legal strategy, it is true that we have taken the position in court that causation has not been demonstrated that is accurate.

But the statements that are being attacked here, these statements that were shown to you on the poster board are public. The statements that they were complaining about are what's been said publicly. If you take a look at those public statements, do you see that somehow they were designed for legal purposes?

No, if you take a look at this list what you find out, that basically these are mostly press releases. You have a total of only 58 or 56 statements over 40

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years. They are not in cigarette ads, they are not, you know, directed to the consumer in the form of cigarette ads. Overwhelmingly, they are press releases. And they are press releases that happen to correspond to points in time when legislation is being taken up. When something has been considered by way of further regulation of the industry.

And what do these statements really say? Why is the position being stated publicly that they are complaining about? Because when regulations are proposed to set ceilings on tar or nicotine, or say that some other constituent like carbon monoxide is the culprit, we have a right to speak to the public issue. We have a right to state our position in order to affect the regulation of this industry.

That's why we are issuing press release, that's why we are showing up at meetings and making statements. We are participating in a process that's been recognized and respected in this country for 200 years, which is to speak out in order to affect public opinion in order to affect the development of political philosophy and political action.

And when we speak out, the real question is, not just why, but do we say anything that's false? Have we misrepresented a fact in any one of those ads? Have we

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misrepresented them? Have we concealed some secret in any one of those ads?

What's the secret after all this period of time? What is the treasure trove of knowledge that is

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somehow concealed in these ads? They can't find it. Much as you try, whether it's the public position, or it's the selected documents, if you look for a scheme to defraud you will find controversy, you will find complex problems, but you will not find that this industry has actually gone out and mislead anybody. Nobody has been mislead in this process.

Thank you, your Honor.

MR. LONG: Good afternoon ladies and gentlemen. You haven't heard much from me during the last three weeks, and I assure you that is not going to change much this afternoon.

I'm here to address two quick topics. First is TRC, counsel for top research; and the second is my client, Lorillard. We haven't heard much about Lorillard in the last three weeks.

The first thing I want to talk about on CTR is this issue of dependence? You heard plaintiff's attorney say CTR was somehow fraudulent because it was not totally independent. Let's look at the source of the document that first started the ball rolling on the CTR, and you

have seen it many times in this trial. I think probably the 11 of you have seen this more times than anybody who saw it when it was published 45 years ago.

If you recall Dr. Rubin when I asked him, when he was in medical school, when this was published in 1954, and I asked him if there was a buzz or big discussion about the frank statement. Then he laughed and said, you got to be kidding.

So again, we have had a lot of attention paid to this, but there was not a lot of attention according to the evidence paid 45 years ago.

But the point is that the companies did live up to the frank statement.

And let's look at the issue of independence. And what the company said about the dependence of the frank statement.

And if you look at this, the company said, we are going to fund research, it is their money, they are funding it. The funds come from them, and we are going to make a joint industry group. So it's a group that they are joining together.

Now, I'm not going to sit up here, stand up here and tell you that it is totally independent. They started it, they own it, they funded the whole thing. Obviously you can't argue that it is totally and

separately independent, CTR as a whole.

But the key to the independence issue comes in on the Advisory Board they set up here. They did say they would have an advisory board of distinguished scientists who would be disinterested or independent of the tobacco industry. That's the independent part of CTR, the Scientific Advisory Board. And I think the evidence shows that that's exactly what the companies did, they followed through and had an independent advisory board.

Now when we are talking about CTR in this case, there is really only one witness who has addressed CTR in depth, and that was Dr. Emanuel Rubin.

The plaintiffs like Dr. Rubin. They show you his picture, they read you his book, they apparently think Dr. Rubin is very credible. So do we.

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Dr. Rubin is the only witness in this case who went through the trouble to go back and look at the CTR documents, to look at the research grant process, the research that was funded, the research that was published, the journals it appeared in, the scientists, the co-funders, the only witness in the whole case to do that.

And then he comes to us and give us his opinions, and plaintiffs believe Dr. Rubin is very credible. They quote him almost as I do. They didn't tell you his bottom line opinions on CTR. And let me

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remind you what Rubin's opinions were.

This was the first of his opinions. The SAB directed funding program for research grants was performed in an exemplary fashion, and the results of that program, in terms of the research, was outstanding.

That's one of Rubin's opinions.

Another opinion, in general, the investigators who carried out research sponsored by CTR were among the finest scientists and physicians in the United States and performed outstanding work.

And the last of Dr. Rubin's opinions about CTR, in terms of the quantity and quality, the results of the research were exemplary, were published in the very best journals of the United States, and indeed internationally and.

If you recall, Dr. Rubin went through a list of the co-funders, the institutions like NIH who had also contributed to the same research. And he went through a list of the institutions, such as Case Western Reserve here, which had received funding. And all in all that's basically what Dr. Rubin said about CTR was that it was a fine organization, and that over the years it had spent over 300 million dollars funding over a thousand researchers that resulted in over 6,000 published articles in the scientific literature.

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And Dr. Rubin also pointed out, and this is uncontroverted, that the Scientific Advisory Board, that funding constituted 95 percent of the total funding of CTR.

Now the plaintiffs are claiming that CTR was somehow a fraud because there was a public relations firm, Hill & Knowlton involved in the very beginning, and because lawyers were involved.

Ladies and gentlemen, that was no fraud, that was no secret. That was known to everybody from the get go on CTR.

I have here, this exhibit will go back in the jury room with you. And I'll quickly explain to you what it is. This is a letter to the Department of Justice, January 26, 1954, from the chairman of what was then the TIRC. What's now the CTR. And the chairman was responding to this gentlemen at the Department of Justice, to questions that were raised about TIRC. And in this letter, as you go through it you see on page 6 where it clearly stated that the committee, TIRC, has employed the firm Hill & Knowlton. This is no secret. This is no fraud.

To go further back. The TIRC has put together this limit of power, is what TIRC could do and couldn't do. If you notice here, one of the things they believed

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they could not do was to participate in any activity or give consideration to any matters affecting the business conduct or activities of its members.

And if you go on down. They make clear that to this end the committee is proceeding under the advice of legal counsel. Selected from among the counsel are nominees of its members.

There is no secret that there were lawyers involved. This here, about participation in activities that affect the business, this meant that they could not get into work that had commercial overtones, work that was proprietary, product development.

And Mr. Coughlin showed you this letter from Dr. Sommers, which had the reference to legally permitted tobacco research. The new name for CTR, if you look up above to what he didn't tell you, the lawyers had raised anti-trust law concerns with CTR. These anti-trust law concerns are the very type of concerns addressed with this competitive activity back in 1954 that went to the Department of Justice.

So there was no secrets about the lawyers involved, no secrets about we do have special projects. And Dr. Rubin researched the special projects, went back and read all the articles about special projects. And he told you the lawyers did have a role in selecting this

research.

Special projects was separate from the SAB work. The SAB work, 95 percent of the funding was over here, special projects was over here. Dr. Rubin went through all the work that was done as a special project and he testified that, just like the SAB work, special projects funded good scientists, they did good research relative to smoking and health, and it was published in great scientific journals.

And nobody has come in here and told you that special projects was used to hide or destroy any specific time of research. We see these broad allegations.

Now, when Dr. Rubin testified, plaintiff's counsel showed him document after document after document, internal documents from the tobacco companies.

Dr. Rubin basically said, that's not important to my opinion. I'm interested in the output, what actually went out of CTR rather than what people would say about it.

And it's clear, ladies and gentlemen, if you look at those internal company documents, there was from time to time continued discussion, continued disagreement over C R, what CTR should be doing, what it shouldn't do. Was it too independent? Was it not independent enough?

But ask yourself, if the tobacco companies had

total control of CTR and the SAB, why didn't they simply change the direction rather than sit around and talk and debate. They didn't because they couldn't. SAB, the Scientific Advisory Board, directed the research activities in the course of research for CTR.

And I think you will see that even as these companies continued to internally debate what happened at CTR, the SAB continued to the fund good research, relevant research, and it was published in good journals.

And you will see, as the plaintiffs admitted and it was shown last Friday, over the course of the

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years, the Sixth Circuit's reports, the documents that the plaintiffs rely on heavily, have cited hundreds of publications that were the result of funding by CTR.

The plaintiffs can tell you that this research was not relevant and that it was concealed, but the people who write the Surgeon General reports didn't have any trouble finding it, and they obviously thought it was relevant. And that alone should establish the validity of CTR.

I briefly want to talk about my client, Lorillard. Again, you haven't heard much about Lorillard in this case, and if you remember three weeks ago I asked you on opening to listen carefully to specific evidence about specific defendants.

So when you get back to the jury room think about what you have heard about Lorillard. The plaintiffs have almost ignored Lorillard. They have almost ignored their burden of proof to prove their claims against Lorillard. The worst proof of Lorillard being involved in mail fraud or wire fraud, any specific mailing or wire into the State of Ohio, wired in by my client, where is any proof of Lorillard involved in any evidence tampering or any obstruction of justice.

Remember, Lorillard, according to the Plaintiff's conspiracy theory, is a an integral part of this conspiracy, and if the proof fails as to Lorillard, then so goes the conspiracy theory.

Now, the plaintiffs have said that my client, like others, targeted minors, targeted youth with their advertising. But what documents have they shown you here is one that they through up today. This is the document that talks about Newport and the fact the base of the business is the high school students.

This is not a good statement. I am not going to defend this statement. But ask yourself, is this a marketing plan from Lorillard? Is this a document written by a marketing executive, somebody who's taking polls or planning the advertising? No.

You look at this, this person was reporting on

his sales figures in field three. And field three was, obviously if you look at the very bottom somewhere, near Mt. Laurel, New Jersey, this man was a Sales Manager sending in his figures and making some comments. Again, it is not a marketing plan, and plaintiffs have submitted no evidence to show that my client targeted youngsters with any Newport ads, or any other ads.

Here's another document showing how my client targeted youth. This is a school bus driving by a Newport Lights ad. And I suppose plaintiffs would have you believe that people at Lorillard spent weeks combing the country and analyzing statistics to find out where the school bus passes so they could target the kids on this bus.

This picture doesn't show much. The couple on the other document is the best they have to show against Lorillard, and it doesn't have anything to do with targeting of minors.

They claim Lorillard was a part of this so-called gentlemen's agreement not to work in-house and not work on safer cigarettes. But what's the proof been in this case?

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The only witness who testified much at all about Lorillard's conduct was the first witness, Professor Jaffe. And I asked professor Jaffe just a few questions.

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And one of the questions I asked him was: Wasn't it a fact that he had not seen a single Lorillard document that referenced any type of gentlemen's agreement. And he agreed not a single document.

And we talked about the fact above that. That the work that Lorillard was doing in-house was not consistent with any agreement not to do in-house biological work.

And we also talked about the fact that Lorillard had been doing in-house testing on phenols, which the public health community had labeled as dangerous.

Lorillard patented this research. Lorillard gave this work to the Surgeon General before the 1964 report. All of this conduct, testified to by plaintiff's witnesses, is totally inconsistent with any theory of conspiracy on a gentlemen's agreement.

That's basically what we have in terms of Lorillard here. We have that testimony by Dr. Harris, these are the 9 Lorillard documents the plaintiffs have put into evidence. Look at these documents and see if you can find evidence of mail fraud, wire fraud, or evidence of tampering or obstruction of justice.

If the plaintiffs have evidence I'm sure they will point it out to you.

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Thank you very much.

MR. LERMAN: I needed a little extra space.

Good afternoon, ladies and gentlemen.

I've got a half hour to talk to you. And do me a favor, if you see Mr. Weber extend a big hook to make me sit down, give me a signal.

I'm going to talk to you about advertising. Mostly I want to talk to you about some issues that are particular to my client, Philip Morris, and I'm going to get right to it.

Advertising. I want to pick up where Mr. Bernick left off in terms of what this case is about.

This case is not about whether cigarette advertising should be legal or banned, that's not the issue in this case.

It is legal, it's regulated by the FTC, it's been regulated by the FTC since 1955. This case is not about whether or not cigarette advertising can or cannot be effective in communicating a message to smokers. It's lawful to advertise effectively.

And this is not a case about whether youth smoking or under age smoking is or is not a good thing. It is not a good thing, it is not a topic to be trivialized.

The issue that the plaintiffs have to prove in

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this case, pursuant to the mail fraud allegations that they have made, and the instruction that you need to pay attention to in analyzing these youth marketing claims, are the mail fraud instructions.

The issue that the plaintiffs have to prove to you is that somehow our advertising violated mail fraud law.

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And you are going to look at those mail fraud instructions, you saw them this morning, you will see them later. Ask yourselves where in the mail fraud statute it talks about targeting advertising that's regulated by the Federal Trade Commission.

How does that violate a statute that's been raised in this case?

Now, ladies and gentlemen, the plaintiffs claimed that we target kids with our advertising. Let me stop on the word target. Target means that we design intentionally, craft and strategizes our marketing to get to kids who are under age and below the lawful limit to smoke. They say that we do that, and they say that advertising is therefore effective in getting kids to smoke.

That's their two part proposition. And I want to start, we have heard a lot about this before. I want start with that second premise, that advertising somehow

gets people to smoke. I am not going to review for you the well established literature, the well established independent science from the FTC, from the World Health Organization, from various journals on marketing.

The overwhelming consensus that advertising doesn't affect consumption, I'm not going to review that with you. You have seen it you know about it. I'm not going to review with you the ad ban studies that have shown that limitations on advertising in foreign countries have no discernible effects on consumption. You have heard all about that.

I want to talk to you about a couple other things that came up during the trial that I haven't had a chance to talk to you about. The first one is the testimony of Dr. Cloninger, who was the doctor from St. Louis, the psychiatrist. He spoke during his testimony about motivations for people smoking, why they smoke. And he came up with three reasons, peers, parents, and personality. Three reasons.

And it was interesting testimony, because what Dr. Cloninger said was the motivations for smoking start with social values, with what you learn in your home and from your parents, with the circle of friends that you travel with and the social situations that you find yourself in your job, your schooling. But he also talked

about personality; your desire to experiment; your curiosity to find out about something like smoking; your desire to try something different or to take a risk. And for kids, experimentation and curiosity is an important reason why a kid would decide to take that first puff.

Think about a 15 or 16 year old, a 17 year old, an 18 year old, still deciding to take that first puff. And Dr. Cloninger spoke about that with -- what I found interesting about Cloninger's testimony, there wasn't a single cross examination question raised by the plaintiffs to Dr. Cloninger's testimony regarding why people smoke. Not one cross examination question.

He never mentioned advertising as a significant factor. He never mentioned advertising at all. Not one question from the plaintiffs.

And there is something else I want to talk about. Why don't the plaintiffs want to talk to you? When they talk about why people smoke and the effect of

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advertising on smoking, why don't they want to talk to you about the polls and the interviews with smokers where the question is directly put to people, why did you start smoking?

We showed you the Gallup polls and the Zinser poll. I'm going to show you the results of those polls in a second. Adults, adolescents, the results are always the

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same. You ask smokers why did you start smoking? And they respond with different reasons, family, peers, curiosity, almost never advertising.

In fact, Lucy Henke testified that she reviewed over 50 depositions in this case where the trustees who smoke were asked under oath, why did you start? These are the plaintiffs in the case. And only two out of 50 or 51 mentioned advertising, and those two mentioned advertising and also mentioned other factors.

Advertising. When people are asked why they start smoking advertising is not the reason. Why? Is that not where we are focusing our attention on the effect of advertising in this case? Why is that ignored consistently by the plaintiffs in this case?

Ladies and gentlemen. The problem with ignoring what people have to say about advertising maybe came out best in Dr. Harris's testimony. Remember Dr. Harris told the humorous story about how he started smoking. He was playing poker in college with some people. They thought he looked like John Paul Domondo. He was smoking a French cigarette, started smoking for years. Advertising had nothing to do with Dr. Harris starting smoking as a college student.

Something about Dr. Pierce said how medical students don't smoke. Dr. Harris, that's real world, real

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people talking about why they smoke. And that leads me to talk about the one person in this case who stands alone in the literature, stands alone in his conclusions, separates himself entirely from the body of research and work that's been done on this issue, Dr. Pierce.

Dr. Pierce ignores the basic question to people; why did you start smoking?

And I want to talk to you about Dr. Pierce's study, because all the criticism and detail that we have gone into with respect to Dr. Pierce in this case, it boils down to one thing.

Dr. Pierce had a group of kids age 12 to 17, he talked to them in 1993, and he talked to them again in 1996 when they were age 15 to 20. He never once based his study on asking those kids, okay, during the last three years, why did you start smoking, if you did? He didn't ask that question. He created something called receptivity, which doesn't exist in the marketing literature; and he created some variables; and he took some information. And then he came to the startling conclusion that one-third of all smoking is caused by advertising.

That's an unprecedented conclusion, by somebody who's not a marketing expert. And although plaintiffs in their cross examination of Lucy Henke tried to suggest

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that Dr. Pierces was a medical doctor, he's not a medical doctor, he's an epidemiologist, which means that he is an expert in statistics. But he is an expert in statistics

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dealing with medical issues not consumer behavior or advertising or the effects of advertising on people's decision-making? He constructed a study that doesn't have validity in the marketing context.

I want to show you just one slide with respect to Dr. Pierce's study.

According to Dr. Pierce, if in 1993 you told him that you definitely wouldn't smoke, and three years later you still haven't smoked, but now you tell him you probably aren't going to smoke in the future, he counts you as on the way to be to being a smoker.

That's if you look at the details of his study. The study is designed to exaggerate the impact of advertising. In fact, it's designed to assume that every change in attitude or behavior is based only on advertising. That's why he comes to the conclusions that he does.

According to Dr. Pierce, if you smoke one puff of a cigarette in the three year space between the time you were interviewed in '93 and when he got you in '96, regardless of when it was, he counted you as a smoker, as an experimenter on your way to being a smoker.

Dr. Pierce's study, ladies and gentlemen, has no validity. It defies common sense.

But Dr. Pierce's analysis that he offered in other areas also defies common sense, because Dr. Pierce constructs a world in which he thinks advertising is the key motivator for everything that happens.

You remember his testimony about Virginia Slims, and we have heard about this in this case from a couple of witnesses, Dr. Harris and Dr. Pierce, the notion that women started smoking at greater rates in the mid-60s solely because there was a product called Virginia Slims that started advertising.

Pierce and Harris completely ignore the social phenomenon that is going on in the 60s with respect to women. Completely take it out of the equation. The fact is that smoking rates for women started going up in 1964. That's right about the time that Betty Friedan writes her book and the National Organization of Women is starting to get active and the entire women's liberation movement, as it was called then, begins to pick up momentum.

Virginia Slims was not launched as a brand in this company until 1967, three years after the uptake in smoking. Pierce and Harris don't pay attention to that, they look at graphs and they say, any change in consumption pattern is due to advertising. They assume it

without being able to show it.

One other thing that Dr. Pierce told you. He talked to you about the uptake in smoking that he says began in 1985 or 1986, and he drew that graph for you. And he said this corresponds to when the Joe Camel campaign came out, and it shows how under age kids began initiating smoking in the mid-1980s, and it's due to Joe Camel.

I want to show you the data behind that. This is the data that Dr. Pierce was working off of. This is first use among 12 to 17 year olds. In 1985 the rate was 111.3; in 1992 it was 115. Joe Camel was launched in 1988. There was no uptake as a result of the Joe Camel campaign.

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Dr. Pierce drew a graph that ignored the actual data points that was projected for those years. The uptake is observed starting in 1993 and 1994, five years after Joe Camel has been in existence. It wasn't Joe Camel, ladies and gentlemen. The graph was inaccurate.

But there is more than that. Let's go to the second point. Did we target kids? Because there is a complete disconnection between the proof that the plaintiffs thinks or claims that they have presented and what's actually been presented.

They have shown you sporadic documents over a

20 or 30 year period that show somebody in some company at some point was making reference to somebody under the age of 18. There are no documents creating a strategy, no documents laying out a media plan, no documents showing you a focus group survey that dealt with kids under the age of 18 to test advertising or to test the reaction against advertising.

Lucy Henke was in here. She told you what she did when she worked for M&M Mars. When they were designing a candy bar campaign for kids they actually took 14 and 15 year olds, surveyed them before an advertising campaign, launched the campaign, surveyed them after the campaign, did focus groups: What's your response to this advertising?

It is a complicated process. You haven't seen document one in this case where any of these companies sat down with 15 year olds and 16 year olds and said: How do you feel about this advertising?

In fact, Lynn Beasley, who designed the Joe Camel campaign, came into this courtroom and told you that when she was trying to replace that Bob Beck campaign -- remember poor Bob? He wasn't doing a good job for Camel -- she did focus groups of 18 to 24 year olds and 25 to 34 year olds. She called them competitive smokers. That means Marlboro smokers, Viceroy smokers, somebody

who's not smoking Camel.

And she did focus groups on 18 to 50 year old franchise smokers, people who smoke Camel. Making sure that anybody who ran an ad campaign didn't offend the people who were using the brand.

And she at the time tested market groups from 12 to 14 and 25 to 34.

And she said in talking to these focus groups, it was my idea to show them some of these Joe Camel executions. She said as we began doing that these folks liked the execution. She was using focus groups of adult, lawful smokers. That was her testimony.

And you know what? She wasn't cross examined on it. There is not a single document to contradict it. It stands as the uncontroverted testimony and evidence in this case as to how Reynolds launched Joe Camel.

Let me talk to you about the documents that pertain with respect to Marlboro and to Philip Morris. We keep hearing about Myron Johnston.

You look at Myron Johnston's documents and I can tell you, I like Myron Johnston's documents better than these guys do because they prove that Philip Morris wasn't collecting data on underage smokers. And let me just show you one.

This is Myron Johnston's document from March,

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1981. In March, 1981 Myron Johnston is writing one of these documents. He's just come up with some new public information, he's sending it.

And he says, "until very recently there have been no good data on teenage cigarette smoking for the years after 1974. For seven years, Philip Morris hadn't had any good data on teenage smoking." That's Myron Johnston. "There is no monitoring, there is no focus group work, there is no reaction to ads, there is not even any demographic work. We have had no good data since from 1974.

"I have recently come upon two excellent sources of data on cigarette smoking. The most useful data are from the Survey Research Center at the University of Michigan, a public source. These companies weren't targeting, crafting, strategizing, doing the focus group work they needed to do. There was no targeting and there has been absolutely no evidence in this case that that happened. Not a single document.

In fact, when Jim Morgan was here he laid down the gauntlet, he said there were 250,000 documents that have been produced in this litigation, and I'm looking for a plan for Marlboro, or something that gets put in front of me that shows me that my company sat down and strategized how do we reach the 14 and 15 year olds? How

do we get to the underage smoker?

He was cross examined here, not a single document produced in cross examination, not a single document shown to you today in the closing argument.

There is more. Take a look at the ads. Boy, you know what? We keep looking at these internal documents as though what people are writing internally is what's going on in the real world.

What ads were being run by these companies? We see documents from Reynolds in the 1970s that talk about underage smoking and 14 to 17 year olds. And this is very concerning to the plaintiffs what ads were Reynolds running in the 1970's? And we saw examples of this.

Here is the 1974 to 1979 ad campaign for Winston. Remember, Winston is fighting for market share with Marlboro. Marlboro is overtaking Winston in the 70s. Actually, from my clients perspective we are killing Winston in the 70s. This is what Reynolds comes up with from '74 to '79.

Remember when Dr. Arnett told you the guy in the middle up there in the front row, he was the youth targeting guy. He said that's the one, the one in the middle, the top row, that's the one that appeals to youth.

This is absurd, this is not targeting youth, this is targeting adult smokers. These are Reynolds ads

that were run in the fall of 1980. These are the Kool executions that were being run in the 70s.

You saw some Kool marketing documents from 1975 this morning. This is the youth appeal that Kool was using in the 1970's.

Complete failure of proof, ladies and gentlemen.

And who do the plaintiffs bring in as their experts? Did they bring in an marketing expert? And the answer is no. They brought in an epidemiologist. They

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brought in a medical doctor, Dr. Davis, whose training is in medicine, who believes that advertising should be banned, who came in here and told you that the companies don't protect their logo.

You remember, he brought in that squirt gun that got me all excited because he pulled it out on the witness stand. He didn't tell you, for instance, that these companies sue people who use their logo and trademark; that they have people whose sole job it is to bring lawsuits and enforce the trademark if the company doesn't protect its trademark. It can loose it.

He didn't tell you any of that.

Who else did they bring in to tell you about advertising? They brought in Dr. Arnett. Arnett, who is a psychologist, not a marketing person. None of the

witnesses that they brought in actually have ever devised an advertising or marketing program, presided over one, executed one. These are not people who are involved in marketing.

And Dr. Arnett, remember Dr. Arnett? His testimony was based on documents that the plaintiffs had given him on cross examination. Do you remember that he didn't want to answer questions about documents unless he had the highlighted version that he had prepared before he testified? Remember he kept saying, Mr. Weber, I'm looking for the highlighted version.

Dr. Arnett doesn't know what happened in this industry. The people that we called know what happened in this industry, Morgan and Beasley, and they were here and they testified, and they looked you in the eye, and they told you what happened when they were at the company.

Morgan stepped up to the problems at Philip Morris when he thought there was a failure in judgment. He didn't run away from it.

Beasley told you how they developed Joe Camel. These are not the evil kabul that's out there scheming to get 12 year olds out to smoke, ladies and gentlemen.

What about Lucy Henke? We brought Lucy Henke in for two reasons. First to tell you about the body of academic literature that says advertising doesn't cause

smoking; and second to give you a perspective. I think a more respective, if you will, perspective of how kids respond to advertising Lucy Hanke told you her work showed kids aren't able to process advertising, they don't see pictures and just go out and smoke. That's not what her works shows.

And I thought her cross examination was a little unfair when plaintiffs suggested that because later in her career, after she had published her work the tobacco companies contacted her and hired her as a consultant, that she had somehow been bought and paid for and that she was here lying because on occasion she's hired as a tobacco consultant. I thought that was unfair, particularly since her original work in 1978 before she did her doctorate on non-verbal communication with kids, she told you that she changed her views from '78 to 1980. And I think it was presented here as though she changed her views when she got a check from the tobacco companies. And that's not the evidence and I thought that was unfair.

Bottom line ladies and gentlemen, they haven't made out a case, not under the law, not under the facts.

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I want to spend the remaining time that I've got which is seven minutes on Philip Morris. Maybe I have eight, if Mr. Weber is in a good mood. If he thinks I'm doing a good job.

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Let me tell you about Philip Morris.

First of all, I want to talk to you about this company. For forty years Philip Morris has contributed to improve it's product. Responding to the health community in making a safer product. One of the things you saw that Mr. Carchman introduced to you is accord. Accord is a technological phenomenal product, it involves 40 patents, aluminum alloy, microchips, things that looks like you are smoking a beeper. It represents the -- that's funny, but it represents the culmination of work.

When these plaintiffs say there couldn't have been a safer product developed. I say take a look at that Accord and tell me how that product could have been developed in 1961 or in 1970, or 1980? That is a product that only could have been developed in today's technologically advanced world.

We had to, Philip Morris had to invent haven't an alloy to heat the cigarette. And the story of the development of the Accord and the story of other things that Philip Morris has done in terms of ventilation and laser technology and dry ice expanded tobacco, all of those steps are a company committed to a safer product.

Know who else says that? William Farone. The man who came here to dump on the company, even Farone indicated he was hired by Philip Morris to work on a safer

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cigarette that he spent eight years doing that he had 200 people working under him. He's proud of the work he did and he thinks he made a lot of progress while he was there. That's all his testimony, even Farone has to admit this is a company that has been responsive to trying to make their product safer.

I want to talk a little bit about nicotine, because we heard about the nicotine, Mr. Coughlin waved that book, so I do have the book.

All right, William Dunn wrote the memo and they say it's a big secret. And you will never see anything in this book that says anything like what he says in his memo. So when this goes back with you in evidence, on page 5, if you open the book you will see a common postulate. It is the peculiar pharmacology of each of these compounds that reinforces smoking behavior. Goes on to say, apparently there is and optimal dose for nicotine, for too little or too much is rejected by tobacco smokers.

You will see on page 5 and page 6, ideas that exactly mirror what's in that William Dunn document. No secrets.

And let me tell you about William Dunn. William Dunn and Philip Morris studied nicotine because they should, because they need to know about their product. And within Philip Morris the study of nicotine

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was an appropriate thing to be doing. It wasn't squashed or suppressed.

Let me tell you about something else. Dunn's work lead Philip Morris in the 1980s to do what? Develop the first commercially marketed denicotinized cigarette. Philip Morris is the company that spent 300 million

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dollars figuring out a way to take nicotine out of tobacco built a factory capable of producing 20 million pounds of denicotinized tobacco a year and marketed Next, their denicotinized cigarette, test marketed even in Toledo.

It failed eventually but this is not a company that believes that nicotine is essential for a commercial success. They tried to market a denicotinized cigarette. They didn't get it right, maybe in the future they will.

Let me talk about William Farone briefly. And let me just say these three Latin words. Alea Jacta est. You know what? He joked about what Farone said on the day he was fired. He said Alea Jacta est, meanings the die is cast.

That wasn't a friendly statement that Farone made on the day he was fired, that was a statement that Julius Cesar said before he sacked one of his enemies. It is a declaration of war. And when William Farone came in here to testify ladies and gentlemen, he holds a grudge against Philip Morris and he tried to dirty up Philip

Morris.

He told you about things that didn't pan out; code words, biological activity. I'm not going to spend time on it, it's not a code word used by everybody, including the naturally occurring denitrification. The process Harold Burnley testified about, it is not an issue not commercially feasible, despite what he had to say.

He said, we didn't test ingredients. Richard Carchman in here and gave you testimony about the ingredient protocol for testing, everything is tested independent panels have reviewed our testing, and the Office of Smoking and Health has reviewed our testing for safety.

He told you about, he told you about document destruction. And I want to spend a little time on that.

Farone tried to tell you that Osdene -- and I'm going to talk about Osdene is the last thing I want to talk to you about. Farone told you Osdene destroyed documents which documents in beef to documents are Richard Carchman was in here, one of his job was to work with INBIFO for the years he was at Philip Morris. He told you every lab report ever generated at INBIFO back to the 60s is still at INBIFO, intact.

He told you there are INBIFO documents at Philip Morris, he has files of them going back to the 60s.

He told you that in his litigation, all INBIFO documents have been made available. There is not a single missing INBIFO document that has been proven in this case and Carchman wasn't even cross examined on it, INBIFO, because it gets certified by the FDA. It's been certified as having generally good laboratory practices GLP.

You heard Carchman talk about that INBIFO has all of its records intact, period, end of the story. And they have been made available to plaintiffs in litigation. And that testimony went unchallenged.

So whatever Farone was talking about with respect to Osdene, there is no proof in this case that a single document is missing or has been destroyed, no evidence of what document that would be or what it is that INBIFO would have been doing that would have required anybody to destroy it. No evidence whatsoever.

Let me talk about Osdene.

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I talked about him before in opening statement, I want to talk to him about him now. He took the Fifth Amendment. You saw that tape, he took the Fifth Amendment at the direction of his lawyer. Philip Morris was not his lawyers at that deposition. In fact, Philip Morris has written letters to Osdene asking him to testify.

This is a letter from the CEO of Philip Morris. We have repeatedly requested that you testify fully and

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truthfully at your depositions in civil cases, and that you not invoke your Fifth Amendment rights. I want to repeat and personally underscore that request.

We wanted Osdene to testify.

Now the court has told you that you have the right as the jury, and you do, to draw a negative inference from what Osdene had to say or not say, as it turns out. But in this case we don't know why Osdene was taking the Fifth Amendment. What we know is that Philip Morris wanted him to testify.

In fact, if you take a look at some of his testimony, you will see how unfair it would be to take a negative inference.

Let me ask you this, Dr. Osdene, did Philip Morris manufacture cigarettes while you were employed at Philip Morris?

Same response, meaning he takes the Fifth Amendment.

Did Philip Morris manufacture the Marlboro brand of cigarettes while you were employed at Philip Morris?

Same response.

I don't think you can take any comfort in one way or the other of classifying Osdene.

I see the hook coming out from Mr. Weber so I'm

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really done.

Philip Morris called Richard Carchman, Harold Burnley, and Jim Morgan. In a way, three very different people. Three different persons but in another way very much alike. They were intelligent, they were dedicated, they were direct in their testimony. They had credibility. They answered questions.

They were here to tell the story about what they knew about how we manufacture cigarettes, how we research and develop cigarettes, and how we market cigarettes. I would have liked to have called more witnesses but we had a short trial, and I hope you will, in judging Philip Morris, judge them as well. They represent this company here, and they should be the symbol of the company as you go back and deliberate.

Ladies and gentlemen, there is no wizard behind the curtain, there is no secrete kabul manipulating these gentleman. There was the testimony or suggestion that Harold Burnley didn't know why it was he was adding ammonia in the process.

You remember, Mr. Coughlin said there are tens of thousands of good people who work for tobacco companies. Harold Burnley is one of them, and maybe he just doesn't understand why he's adding ammonia to the product as though there is some sort of secret kabul

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manipulating people. There is no wizard behind this curtain. The people you saw are the people who run this

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company. Honest, directed, committed, the people you want running the company.

It's not an easy job they do, their business.

Well, speaking of not an easy job, you don't have an easy job either. In a few hours this case will be in your hands. You have paid remarkable attention to the evidence in this case. I know you are going to decide this case in accordance with the judge's instructions, in accordance with the law, and in accordance with the evidence that has been introduced. That's all anybody can ask.

I thank you for the attention you paid and I thank you for listening to me now.

Thank you.

THE COURT: Mr. Weber.

Let me just ask kind of a yes or no. Do you wish a break now?

Okay. Five minutes is all we are going to take. So don't talk about the case until it is submitted.

Five minutes, no more.

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(Brief recess.)

THE COURT: You may continue.

MR. WEBER: Thank you, Your Honor. Good afternoon, Ladies and Gentlemen. As I said some three weeks ago, it is again a pleasure to be in front of you on behalf of the R.J. Reynolds Tobacco Company and the several thousand men and women who do the company's work.

This case has moved quickly, as I'm sure you know. I'm sure you have noticed from time to time some of the lawyers may have red eyes from staying up a little late. We're in the home stretch. And it is a particular pleasure to speak with you on the eve of St. Patrick's Day.

Before I go on I want to offer one quick observation that I know everyone here shares, and that is we do appreciate the wonderful attention and cooperation and patience you've given us, your generosity in laughing at our jokes, your commitment to your duties; sunshine, snowstorms, sickness, health, you've been here.

We thank you, and we're almost done, which I'm sure is good news for you.

My discussion with you today is going to cover three basic topics. First, I want to talk about plaintiffs' theories about conspiracy, what it is they've said and what it is they've proved. Secondly, I want to talk about some of the specific claims that have been made against my client, the R.J. Reynolds Tobacco Company, including the

claims about Joe Camel, and I want to ask you to consider whether plaintiffs have been fair to you, the jury, in how they characterize those issues.

And finally, and most importantly, I want to address the one issue really on which this entire case turns: The claim that wrongful conduct actually caused more beneficiaries to smoke and caused fewer of them to quit, a claim that presents to you front and center the decisions of real live working people, the personal decisions they have made on whether to smoke and on whether to quit. Real decisions by real people running their own lives, their awareness, their attention to the warnings that have been on the packs for 30 some years, what they relied on and what

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they didn't.

And in the course of that discussion, I'm going to remind you of one inescapable fact that dominates these proceedings, and that is that there is a gap, an unbridgable unfathomable gap between the allegations of wrongful conduct and the decisions of these Ohio working men and women and the funds.

Let me turn now and spend a few minutes on these conspiracy theories. You know, the fundamental flaw, I think, of conspiracy theories, like the ones that plaintiffs put in front of you, is they inevitably explain too much. They simplify to an unnatural and unrealistic degree the far

more complex and textured world of real life and reality.

And it is, of course, the very simplicity of a conspiracy theory that makes it so seductive, so attractive. That's why there are conspiracy theories about any complex issue in this society. If you have a complex issue you don't have to wait very long until some simple conspiracy theory comes along that purports to explain everything.

But I think common sense tells us to mistrust these kinds of theories, and that's just what happened here. I think our common sense spoke to us right from the beginning, and it started with the cross of Dr. Jaffe, when the conspiracy theories that he discussed were revealed to be Akron's version of the Emperor's New Clothes: Wonderful to look at, as long as you didn't start examining the substance.

Just a few examples. Dr. Jaffe told you this was a conspiracy limited to companies in the United States, and he said that that was the case because a global conspiracy made no sense in fact or in economic theory.

That was his testimony. That's how they start their case. At the end of their case they brought in Dr. Harris, and he was far more aggressive on this. He testified there may well be an international conspiracy. In his world, German tobacco companies, the French government-owned

tobacco company may well be coconspirators. He was unwilling to rule out any tobacco company as potentially being in a conspiracy.

I had the feeling he was so aggressive in that testimony that if I had kept him on that stand a little longer he would have been telling you there was an intergalactic tobacco conspiracy.

But when you consider this issue as you deliberate, I ask you to consider the stark contrast between the witnesses offered by plaintiffs on that score and the witness called by the defendants. Professor Jaffe and Dr. Harris were theorists, looked at excerpts from selected documents given to them by the lawyers.

We called Dr. Scheffman. Dr. Scheffman served as the chief economist for the Federal Trade Commission, a position in which he analyzed allegations of conspiracy for our government. He applied a standard economic methodology. He gave you a professional approach. He didn't concoct a theory that when facts didn't fit he'd say, well, that was just cheating on the conspiracy, ignore those facts.

He applied a standard methodology and he analyzed this the way professionals do. He looked at the company documents, he said that on direct, and in cross-examination they only asked him about two documents, only two. They

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didn't challenge any of his conclusions.

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He looked at real world economic evidence and history. In short, Dr. Scheffman did it right. He told you that his standard technique was a benchmark analysis to look at the allegation of conspiracy in one market, then look at other markets, see how it compared, see if it was different. If there really were a conspiracy we ought to see a difference, we ought to see effects.

He showed you data from a World Health Organization report. Remember this? There was a chart for men and a chart for women. This is prevalence of smoking. And remember the allegation was the conspiracy in America caused more people to start smoking, fewer to quit. But Dr. Scheffman, he didn't just take the allegation, he looked at data from the World Health Organization, and it showed that prevalence in the United States wasn't on the high side, it was on the exact opposite side that the conspiracy theory would have predicted.

What else did he do? He look at the allegations that somehow product innovation was delayed here in the United States. Do you remember those?

And when he did, when he searched the literature, he found out, and he told you, that the rest of the world lagged 10 to 15 years behind these companies in what they did and what they invented and how they lowered tar and nicotine.

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These companies weren't holding innovation back, they were the world leaders. No cross examination on that point.

He also explained the major alternative design breakthroughs that have been invented anywhere in the world, and it was these guys who invent them, no one else. The alleged conspirators were bringing innovation to the table: Facts that can't fit with the conspiracy theory.

And, of course, not even Professor Jaffe or Dr. Harris dispute the fact that no one anywhere in the world has produced a cigarette that is accepted, that is provably safe or better than anything these companies have done.

Dr. Scheffman also looked at another real world piece of evidence. He looked to see what competition was like in the marketplace. This is a competitive marketplace, or isn't it? Did he find competition? He sure did.

Again, that chart is a little hard to read with those lines, but I'm sure you remember the point. This is not a market and status quo, this is not a market where everyone is getting along happily, surviving together. This is a market where people are fighting. This is a market where Liggett is basically out of business. This is a market where American essentially went out of business. This is a market where, unfortunately for my client R.J. Reynolds, Philip Morris basically kicked everybody's tail.

Dr. Jaffe told you that if you look at other markets,

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soft drink, brewing, et cetera, you don't see changes like this. You don't see the top go down to the bottom and almost -- and in fact disappear. You don't see one of the ones at the bottom go up to the top.

Competition, Ladies and Gentlemen. Real world facts, not theories.

He also mentioned to you how these changes in market share were actually driven by innovation. He showed you on the one chart how American was so much slower in reacting to

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what was being said and putting filter tips on the market, and we saw what happened to Americans' market share.

He also addressed, and he's written about these issues in the literature, he also addressed this issue of, well, if only they'd spent more money. If only they spent more money faster we'd have a perfectly safer cigarette now; you know, the would-have, should-have, could-have type claim.

He looked at that, he said as an expert in innovation you don't look at it that way. What you look at to see is what's the output, what is being produced, what are the innovations.

How do what these companies do on innovations compare to what these alleged nonconspirators do? The fact of the matter, these companies led the world, they set the standard. They set the bar.

And if money could just solve problems, certainly the

federal government would have solved the safer cigarette problem years ago when it was in the National Cancer Institute Tobacco Working Group effort. But it isn't just a question of money, it's an issue of science, building block by block, step by step, experiments being done, research being done, on and on and on.

For example, all the research here in the R.J. Reynolds monograph about the Premier cigarette, the whole chapter in here on how this work couldn't have been done before, it was new materials, new machines. That's how you analyze these issue, not just with theories.

So what was plaintiffs' response to Dr. Scheffman? His testimony was right on the money. What was the response? Very, very brief cross-examination. Questions about what the top cigarette brands were in Italy, I think, or Greece, or something. Questions about only two documents, and that was it.

And then even in the arguments, the plaintiffs' lawyer said Dr. Scheffman's reference to these theories, those aren't the theories in this case. And I'm sure you were as surprised about that as I was, because those are the very theories they have been talking about here for weeks on end.

So much, Ladies and Gentlemen, for the grand conspiracies. What we have there, all there is are shifting theories and still desperately seeking factual support that

can't be found.

I now want to switch gears a little bit and talk about a few issues that relate to my client specifically, R.J. Reynolds.

You know from what we've done that we've split topics up among ourselves, but there are a few issues I do need to address on behalf of my client.

What's happened in this case is precisely what I predicted to you in opening statement would happen. Some few pieces of evidence taken out of context, fed to experts, put in front of you, and the question, the question for you is whether that's been fair.

I want to show you, use three examples of what plaintiffs have put in front of you with respect to R.J. Reynolds, and I want to ask you the question whether they have treated you fairly on these issues.

For example -- if I could have the elmo, please -- this document was put in front of you and represented to you as something R.J. Reynolds ran and published to the public.

Mrs. Beasley came here and said, no, this was a draft,

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a mock up. It never ran. It was never published.
Was that fair? That was Plaintiff's Exhibit 4305.
How about the document they put in front of several of their witnesses, Plaintiff's Exhibit 3141. I'm sure you remember this. How about this document from Camel. 1987.

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Camel saying -- remember, it had the 13 to 24-year-old reference? And what happened when Mrs. Beasley came in and got on the stand? She showed the documents right before, she showed the documents right after. She showed a document by the author of this very one the next day. All of those documents show this was an 18 to 24-year-old product.
Dr. Townsend worked on that project, he testified about the age bracket, as well.
Was it fair to you, was it giving you a fair picture to put that document in front of you? 13 to 24, R.J. Reynolds after kids. Was that fair? Only you can answer.
How about the Plaintiffs' Exhibit 1261? Plaintiffs' Exhibit 1261. This was one that talked about the French Camel ad, said it's as young as you can get. Remember, I asked Mrs. Beasley about this? And remember, we went through the numbers here, and we went, and we looked at the document, which is AIW 3467, the whole document.
And remember on the front page here it says, Dana Blackmar's comments are attached. Do you see that? And we go and we continue, and there's Dana Blackmar's comments.
That's what plaintiff showed you, that one page. And as we go through and we look at the ad, they're talking about, remember this? Was this Joe Camel? Did this have anything to do with Joe Camel or was this a French ad in which a Camel, the beast as they call it, that appears on

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the pack, what was on a pair of jeans?
Is showing them one document in the middle without the attachment that relates to it, is that fair to you? You guys are being given the story. I can't go through everything. I can't go through documents, drafts they put in front of you without putting the finals in front of you.
We talk about some of that with the witnesses. I can't go through the whole thing, but I do ask you, only you can answer that question. And I ask you to judge plaintiffs on that as you would judge me if I did something like that, if I put evidence like that in front of you. Judge them the same way.
Let me talk about Joe Camel for a minute. Mr. Lerman dealt with some of it. I just want to talk about Mrs. Beasley.
We brought her here. She was the one, it was her idea, she executed it, she researched people only over 18 and later only 21 and up, tested on 18 and over. She explained how any ideas that the focus group said might appeal to younger people were rejected. Remember the roller-blading, the basketball executions, they didn't use those.
The initial memo on this for the birthday campaign, remember, no punk hair-dos; remember how that came out of the prior memo where there had been some punk hair-dos from the French campaign, they said these might skew a little

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young. It was clear, no punk hair-do is no youthful executions.
She also explained that campaign was a big success in the 18 to 24 and 24 to 35 age group. R.J. Reynolds isn't embarrassed about that. That was a good advertising

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campaign to reach adult smokers.

Nothing says you can't have some humor in it, nothing says you can't be a little irreverent, and that's exactly what it was. It was a legal campaign to legal smokers, and it was successful.

The real claim here is not whether some kids underage started smoking Camel, because if some kids underage were smoking maybe they would switch to Camel.

We didn't study that the government might have some numbers, but that's not the issue. The issue is whether we intentionally tried to get kids to start smoking. That's the issue. And what was the proof on that? Mr. Lerman went through it, I'm not going to go through it again, but the proof was totally lacking. And it could not be better exemplified than when Dr. Arnett admitted how he wrote that article for the journal, Tobacco Control, and used the word "cause" in it, but when it got published the word "cause" was not there.

There was also some testimony about youth initiation eventually increasing, and the facts in front of you are

that the Joe Camel campaign started in early 1988, and that some three plus years there seemed to be an uptake in youth smoking initiation, at least according to some studies, not all of them.

Now, is the fact that Joe Camel started three years earlier, is that going to explain what happened three years later? Was the Joe Camel campaign the only thing in the universe? Is this another one of those situations where the only thing the plaintiffs and their expert looked at are tobacco reasons, tobacco fault, tobacco responsibility, and they ignored the rest of the world?

Well, one of the jurors gave a question to Dr. Pierce about what about all those other risky behaviors adolescents were in, what was going on with that at the same time?

Dr. Pierce gave a straightforward answer. He said those other risky behaviors were increasing. They weren't advertised. Some of them weren't even legal. Some of them were downright dangerous things. But those adolescent trends were increasing, going up and down. That wasn't because of Joe Camel. It wasn't because of cigarette advertising. If anybody knew what it was because of, there would be a heck of a lot better understanding of adolescents and a heck of a lot fewer parents pulling their hair out, to be quite frank.

Mrs. Beasley testified on 98, 99 percent of the

cigarette market is for those 18 and over, and she said it would be crazy to risk their ability to do that business to try to go after people underage. It doesn't make economic sense. She talked about how 75 percent of the adult market is a market she doesn't have. R.J. Reynolds has only a quarter. And while the overall size of the market continues to shrink, there is still a lot of business there for R.J. Reynolds.

She talked about how switching does occur, it does matter. And how their own data, Reynolds' own data shows 42 some percent of people 18 to 24, 18 to 20, in that age group, are going to switch over a period of years. That's why Reynolds is advertising, that's what they're working for.

We showed you the ads. I'm not going to go through it again, Mr. Lerman did. 1980 memorandum to Mr. Long that

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could be read, I grant you, let's advertise to 14 to 17 year olds. The proof is in what they did, not in interpreting some 20-year-old memo. What did they do? You saw the ads. And I think everybody other than Dr. Arnett agreed about the ads.

Mr. Coughlin showed you a memo that said they were aging all the underage smokers into the Reynolds profile as if they were 18.

Read that memo carefully. See if there is any way that

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it fairly gets that meaning. What it says is that in the statistics they're keeping -- the 18-year-olds are going to go in as continuing smokers if the survey showed they were smokers before instead of new smokers.

It doesn't say anything about people underage, and it doesn't permit that reading in any reasonable way, shape or form.

Diane Burrows' documents, goodness, we've heard enough about Diane Burrows, retired down there in Mussel Shoals, Alabama, giving a deposition in her home.

Diane Burrows -- here is the document. I ask you -- this is 2692 -- I ask you, look through this document, hundreds of references to what Diane Burrows is talking about. 18 to 24, 18 to 34. Lots of age breaks. Hundreds of references.

One in the back that Mr. Coughlin has showed you time and again, that was a collection of data from a published government report. What's the fair picture on this memo? What's the fair picture on this memo? The one page or the whole book?

Now, you heard from a number of Reynolds former employees, Mrs. Burrows, others. They said Reynolds had a policy, they said Reynolds executed the policy, they said they lived by the policy. That is unrebutted on this record.

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Dr. Townsend came here, another vice president, talked to you about research and development, talked about Reynolds' inventions, reconstituted sheet expanded tobacco. It is leading work in identifying constituents and how important that was for smoke modifications; how their work was cited by the Surgeon General and others; how they supported and worked with the government and NCI TWG program until the government quit corroborating.

He talked about pH. I want to spend just a minute on that for Reynolds. He talk about the pH of Reynolds' cigarettes and said it hadn't changed over time, and he had those memos that were shown to you, and he went through this. There were momentary correlations, and people were drawing conclusions, but if you looked at the data over time, the correlations weren't there.

That's exactly what he said. The work was done. He showed you that Reynolds' use of ammonia didn't increase pH. And as Mr. Bernick said, on a broader picture, the pH hasn't increased. That was one of Dr. Teague's memos drawing that momentary conclusion.

He talk about Premier and Eclipse. They asked him very few questions about Premier and Eclipse. They asked him a lot of questions about Claude Teague.

I heard so much about Claude Teague in this case, I started wondering if it was the Teague tobacco company, was

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Teague the only guy who worked there.

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The fact of the matter is, I don't have time to go through it all. I want to mention a couple of Dr. Teague's memos. He wrote one they showed you called Thoughts Regarding the Youth Market. It says draft at the top. They rarely show that, but you'll notice it when you look at it, and the first sentence says, I know we can't do this, I know it's against policy, but here is a bunch of thoughts I have.

So he acknowledged it wasn't in the policy. He was in the R&D department, and there is not a bit of evidence in this case that anything ever happened with respect to that memo. That is to say that any of those ideas were picked.

He had another one called The Crucial Role of Nicotine. Mr. Coughlin played you pieces of that a little bit earlier. Plaintiffs' lawyers get all excited about that memo, but there was one person in this courtroom who didn't get excited, Dr. Neal Benowitz. Remember when I asked Dr. Benowitz a series of questions about that memo? I said, Dr. Benowitz, are these ideas any different from what the outside researchers were saying? No.

Were these ideas that Dr. Teague was expressing any different from the types of recommendations the Surgeon General was making? No.

Were these the kind of things they ought to be thinking about? Yeah.

Were they talking about research that ought to be done? Yeah.

No secrets, no data. Nothing in that Dr. Teague memorandum that wasn't reflective of a wider scientific society at large.

I want to discuss one more allegation on R.J. Reynolds briefly. There was a single vague reference almost in passing by Professor Proctor, and I'll have more on him later, about a document he said might have been destroyed by RJR. I don't know if you remember that.

The document he was referring to was the 1953 Claude Teague document, the survey that was actually here, that Professor Proctor put in evidence.

So I wanted to mention this because they have these allegations about tampering and obstruction. The only reference that any one of their witnesses really made about this is this one about Dr. Teague's memorandum, and Professor Proctor wasn't even sure, and it was puzzling, because he had the memorandum in his hand. And when I had ask Professor Proctor some questions on cross-examination I asked him what he knew what he'd been shown, what documents he'd been given about the R.J. Reynolds R&D library microfilming process. What did he know about what they kept on microfilm and how they did it. Nothing.

And I commend to you two exhibits, ASP 34, ASP 35,

talking about how R.J. Reynolds kept those R&D records on microfilm.

That memo of Dr. Teague's, that '53 survey of cancer research was referred to again today. Dr. Proctor said that was so important it might have changed the course of history if that had been put out.

If you look right in the title of that, it had its first word was survey. What Dr. Teague did, he went and looked at the library and looked up the sources as to what was public and wrote about it and summarized it, because all things were happening at that time. If you were in a tobacco company and the scientific reports were coming in,

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you needed to know what the outside literature was saying. That's what he did.

Professor Proctor at one point even said it wasn't a credible memorandum, it cited the Roffo work, and he said he thought he had discovered the Roffo work until Mr. Bernick asked him on cross-examination, wasn't that the very work that was published or referred to in Reader's Digest?

So, so much for the Claude Teague memorandum.

I said in opening that we'd step right up to the fact that some of the Reynolds documents don't seem to square with company policy. Some of them seem downright dumb. But I also said the issue for you is to look at the full picture. Look at the full picture, make the judgment as to

whether they've been fair to you. Remember the credibility of the two Reynolds vice presidents we brought in here for you, Dr. Townsend and Ms. Beasley, and make your judgment, and it is your judgment alone.

I just offer you one last thought on this. The kind of arguments plaintiffs make in this regard remind me a little bit about how you make an argument that Paul Brown was a bad football coach. You could do it. What you do is you only look at the data on all the games he lost. When you get all that in and put a really good argument together, look at all the games he lost, dumb plays he called, et cetera, et cetera, and if that was the only data you had, it would be truthful, it would be a truthful argument, but the problem is it wouldn't be fair. It would be totally out of context. It would be cherry picking. It wouldn't be fair to Paul Brown.

Ignore the fact he won state championships down the road with the Massillon Tigers, national championship with the Buckeyes, world championships with the Browns. That's context. That's the importance of looking at the full picture instead of just the mistakes or the exceptions here and there.

Now, before I move on to that last subject of causation and reliance, I want to talk, spend a few minutes on the instructions. And just like plaintiffs' lawyers, I want to

preface my discussion of this very clearly. There is only one source of the law here, and those are the instructions the Court gave you. And more than anything else, don't think anything the lawyers say can change a word of that.

I just want to direct your attention to some of those to think about when you get into the room, and, of course, I can't read them all, so I have to shorthand them a little bit; but obviously all I'm trying to do is refer you to different instructions the Court has given you.

One point that I think is very important is the Court said plaintiffs have to prove every essential element of their claims by a preponderance of the evidence. Now, there are some other claims that have a higher burden, clear and convincing burden. Let me just focus on that.

Every element by a preponderance of the evidence, and if they don't satisfy that for any one of those elements that His Honor told you about, the claim fails, period.

And this is important, because if we as defendants had put on no evidence, if when they finished we just stopped and put on nothing, plaintiffs still had the burden of proof. The issue is whether they carried that preponderance of the evidence as His Honor has instructed you.

He also talked about using your common experience, your

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reason and your common sense, and I emphasize that to you as well. Bringing into the courtroom all of the experience and

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background from your lives, what you as Ohioans know is common knowledge, what you as Ohioans know is common sense. Very important for your deliberations.

On the fraud claims, yes, they have to show an intent to defraud. And as the Court said, good faith is a complete defense on the fraud claims.

I refer you back to the witnesses we had here. Mrs. Beasley, Dr. Townsend, the others from the other companies. Good faith is a complete defense.

Dr. Jaffe, plaintiffs' own witness, with respect to the frank statement, Mr. Bernick showed you plaintiffs' own witness said he can make no claim that the frank statement wasn't issued in good faith. So that's not even at issue here, so no fraud can rest on that. Plaintiffs' own witness.

The Court also instructed that they must show that a false or fraudulent statements relate to material facts, and that those material facts were important to reasonable individuals or reasonable trustees in making their decisions.

Plaintiffs have not and cannot meet that burden. I'm going to get into that in a minute.

He also talked about how either the beneficiaries or the trustees have to show reliance, reliance in connection with these causes of action.

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They are required to prove that smokers or trustees relied not on warnings on packs, not on their own awareness on their own choices, not what the doctors told them, not what the professional advisers told them, et cetera, but relied on what the tobacco companies said, and reasonably relied on that.

They cannot prove that, and I will explain precisely why in a few minutes. Indeed, I think a fundamental question here is where is that evidence in this case. Where is that evidence for reliance.

They also have to prove that causation, proximate cause. It is a lawyer's term. What it means, causation, whatever it is this wrongful conduct allegedly did was a substantial part, had a substantial role. As His Honor said, a cause without which the injury wouldn't have occurred.

They can't do that. They can't show that these tobacco companies were the cause for any of the things they complain about. They can't show that smoking would have been different in America, they can't show that quitting would have been different in America. It just isn't here.

On these obstruction of evidence or obstruction of justice, evidence tampering charges, they haven't shown anything in this case, and won't, of an Ohio connection with those allegations. They haven't shown anything in this case

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of actual intention to obstruct or tamper. They can't show the specific intent on that. The proof isn't there. They can't prove those predicate acts. Again, another independent reason to stop the plaintiffs right there.

I want to turn now to causation and reliance, talk about the facts on that, now that I've given it a little bit of a legal background. And I want to ask the real question, did anything these defendants say, did, didn't do, whatever,

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did anything they did that was wrongful affect the real world decisions of either the beneficiaries or the trustees? Did it affect it? Did they rely on it to their detriment? Did it play a substantial part? Was it a cause without which damage wouldn't have happened? Did the funds and members rely?

I'm not going to start out this discussion by insulting your intelligence with some goofy connect the dots picture in which I draw a pack of cigarettes and act like I've proved something. I wouldn't do that to you.

What I am going to do is reason with you about the evidence, about the law that the Judge has given you, and about the facts on causation and the facts on reliance.

Now, given that these are all individual decisions by real people, real Ohio working men and women, one would have thought the plaintiffs would have brought those people in here to testify to you, explain how they decided to live

their lives, what they knew, what they thought, how they made their decisions, what they relied on, but they didn't.

When it came to looking at decisions of real people, plaintiffs took a pass repeatedly throughout this lawsuit. Experts were their friends, not real Ohioans.

They didn't identify for you one single individual in this lawsuit, not one union man or woman who saw, read or heard the frank statement, who claimed to start smoking because of anything these companies did, who claimed not to have quit smoking because of anything these companies did, who claimed not to have the common knowledge that the rest of the community had, who claimed not to be aware of the risk, who claimed not to have read the warnings, who said he was tricked, deceived, lied to, relied on anything that these companies did. Not one person.

You heard Mr. Rowe earlier today said the activities of these companies drowned out everything else. Drowned out. Well, you'd think he would have found one of those drowning people to come in here and explain it to you, but they didn't. They didn't even bother to take a survey or poll of these people.

Plaintiffs' experts actually went so far, Ladies and Gentlemen, went so far as to say it didn't even matter what the facts were with respect to real people, it didn't matter.

I'm sure you remember this from Dr. Harris. "So let me see if I understand you then. It would not -- it does not, in fact, matter to your opinion on causation you expressed on direct, it would not, in fact, affect your opinion if it turned out that every member, every smoking member of these funds started smoking at a poker game with friends by borrowing a cigarette, and because he thought he might look like Jean Paul Bel-" -- actually it's not -- that says Joan, but it's Jean -- "Jean Paul Belmondo. That would not affect your opinion, right?

"A. Yes. For example -- yes. It would not affect my opinion."

This is a reflection of choices made by real people. This doesn't show a respect for their individual autonomy and the decisions they make. This is an I know better attitude because I'm an expert.

So what did they do with these experts? Let's talk about what these experts did on causation.

Dr. Harris was here, a long-time smoking

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advocate -- antismoking advocate. He's got a right to do that, but he did bring an agenda. Indeed, he brought more activism and zealotry to this case than he did science.

He did claim to you defendants' conduct caused more people to smoke, fewer to quit. That's what he said. He gave no analysis, and he never tied it to these union

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members.

What else didn't he do? He did no analysis to compare smoking rates here to the rest of the world, as did Dr. Scheffman, to see is there any real difference rate wise.

He admitted there was no peer reviewed article anywhere claiming that tobacco companies' statements caused people to begin to smoke.

He admitted the existence, if you remember this, of all those social and personal factors I went through with Arnett and I went through with Dr. Harris, all those factors, he admitted the existence of all those factors into why people start, why they continue; social, peers, et cetera, et cetera, access, all those issues. You remember them, I'm sure. He said that they were all factors, but he said he had done no study controlling for all those factors.

And Dr. Wecker, that was exactly what Dr. Wecker said. Dr. Wecker said, if you really want them to look at the causation question you need to control for the other factors, because this is not a world, no matter how they try to paint it, it is not a world in which there are two things going on, everything controlled by tobacco companies and nothing else. That's what they'd have you believe, that if something happens it's the tobacco companies.

Well, it's easy to say, but it's a whole different reason -- a whole different process to confront that with

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cold hard fact where you have to control for other variables, and you can't just assume the result you want is the result you're going to get.

Dr. Harris admitted he couldn't explain ethnic and socioeconomic differences in smoking initiation rates, and clearly those aren't related conduct, conduct by the industry.

And he even had to admit advertising directed at women actually followed their increase in smoking, it didn't precede it, it met demand. It didn't create it.

He ignored Chapter 8 of the 1989 report, Surgeon General report, and I commend that to you. In Chapter 8 of the 1989 report the government specifically looked at pro-smoking activities and antismoking activities. It's discussed at page 649. There is a whole chapter on it.

Page 503, page 516, on and on. They looked at pro-smoking activities, they called them, industry activity, they look at antismoking activity.

They looked at effects on consumption, they could not reach a conclusion that anything these companies did have an effect on that.

Now, Dr. Harris, he worked on that report. He didn't come in here and tell you that, he didn't disclose that to you, those conclusions where they looked at industry conduct and couldn't prove it.

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His opinion is what we call a net opinion. That means there is nothing there. It is just stripped down to everything, when it comes down to his academic say-so. That's what his opinion rested on. No science, no

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statistics, no data; his say-so and naked assertion, take it or leave it.

Which gets me to Dr. Davis. He also came in and gave the opinion on causation. He did I it after giving his pat little lecture about how sandals ought to have Surgeon General's warnings, so if you look at them in the sand it doesn't just say Camel, but it has the warning on it. I'm sure you remember that.

It showed the picture of the penguin, the staged photograph.

Dr. Davis was also involved in the '89 Surgeon General's report. He didn't talk about that with you, he didn't disclose that to you. Instead, he gave you another net opinion. "It's so because I say it's so, and I've been in this business," and he has been in this business for a long time. His entire career has been as health administrator, Office of Smoking and Health, now up in Michigan. We need health administrators, and I'm not criticizing him for that, and I'm not criticizing him in the least for being as strongly antismoking as he is, and he is. You saw him get boiling there about that a couple times

in his cross-examination.

He's got a right to feel strongly. But just as it's his right to feel that way, it is your right as jurors to reject that opinion because there isn't science to back it up and because it comes from a strong deep-seated antipathy toward this whole issue of smoking.

That leaves me then with Professor Proctor from Penn State, the last witness they had -- the last of the three who talked about causation.

And he was a historian, not a medical doctor, not an economist, a historian. And he gave you the opinion that, you know, this Surgeon General's report in 1964, that should have come out ten years earlier; and if it had, the whole history of this would have been different.

Plaintiffs even showed you that chart of Dr. Proctor's a little bit earlier today. I don't have quite as nice a version of it as they do. Let me put that up there while I talk about it.

I'm sure you remember it. That's Dr. Proctor's analysis. He said, well, you know, you just move that curve over to the left there, move it over ten years. My judgment is ten years earlier. I'm a historian. And that's it. Look at how the world would change.

This is emblematic of the problems with plaintiffs' case. This is another one of these issues in which only the

conduct of tobacco companies is analyzed.

It is another trip to Never-Never Land where there is nothing else happening in the world other than what tobacco companies do and what experts think they should have done, where everybody has either got black hats or white hats.

Now, I'm sure that you noticed that plaintiffs asked Professor Proctor to give this opinion, move the curve. Interesting point. They had two medical experts, Dr. Harris, Dr. Davis, who were both involved in that 1989 report.

They were involved, they understood the Surgeon General process, and they were medical doctors.

Did they ask people who understood the Surgeon General process, who were involved and were medical doctors, to give this opinion? Did they ask their economist to give this

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opinion?

This appears -- this is actually a chart that was drawn from parts of the Surgeon General report where they talk about econometric analyses, statistical analyses, real live science analyses, looking at these issues, trying to measure different factors.

But they didn't ask an economist to give this opinion. They didn't ask their medical experts, who understood the Surgeon General's reports, to give this opinion, because they knew the medical experts wouldn't give testimony like

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this come heck or high water.

They could only get this testimony from someone with two vital qualifications. That is the testimony that it should move ten years back, Surgeon General's report should have come out earlier, and the witness to give that had to have two qualifications: No experience with Surgeon General's reports and no medical degree.

Those were the qualifications. He just moved the curve to the left. You remember his testimony? He did no statistical analysis, he did no econometric analysis. He just sat there and said, well, let's move it over. That was the testimony.

He was asked to do this precisely because he had none of the learning or expertise necessary to do it. He was giving this testimony, Ladies and Gentlemen, because he was the one witness uniquely unqualified to do it.

Professor Proctor did, however, discuss astrology a couple times in his testimony. I hope you remember, twice he referred to oriental cosmology. And I'd like to get into that, but we don't have time, so let's come from oriental cosmology back down to earth.

Let's look at facts here, real life facts dealing with real life people. Ohioans, working men and women who made their decisions. Let's go through that in the time we have left.

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What was the common knowledge in the community, the community in which these working men and women came from? What was there? What the Toms, Janes, Joes, Sallys, real people, what did they think? What were they aware of?

It is hard to reconstruct history. We all know what we know. We know what we were told. We know what we were taught.

We brought in Jim Martin, leading historian, American historian, grew up right here in Akron. He brought a disciplined approach, a multitiered approach. He was familiar with the Ohio sources, the Ohio schools, on and on.

And he talked about it. He didn't come here as some hypocrite, as was implied, to say, well, everybody knows, but nobody knows.

He came here to talk about one direct issue: Awareness. What did the community -- when was the community's awareness of these issues, and he made it real clear. I am not a scientist, I am not telling what the ultimate answer is, I'm not telling you what people's opinions necessarily were; I'm telling you what they knew, what you knew just by living in this community.

He talked about how people were taught about smoking from early years in the century in the Ohio schools, how they were tested on it, how it was in Ohio papers, how it was in the union papers, how it was talked about in the

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voluntary organizations, how it went from top to bottom here in Ohio. Nobody started or continued smoking in Ohio without this awareness.

And it was hardly surprising, given all of that, that the opinion polls bore him out, they bore him out directly on point.

And he talked about a number of them. This, again, I know it's a little bit hard to read, but again, these were those comparative awareness charts.

1954. All that is is, have you heard or read cigarette smoking may cause cancer. Simple question. It doesn't prove that cigarettes cause disease, don't. Simple question: Have you heard or read. 1954, 90 percent. That's basically three times in the same year the response of people who knew who delivered the sermon on the mound.

Was that awareness, Ladies and Gentlemen? It sure is.

Was that all he showed you? No. He put in front of you statements from Surgeon General Burney in 1957, saying that people have the information. The news media has done an incredible job of getting that out there.

Statements from Dr. Heller at the National Cancer Institute: Excellent job covering these issues.

He showed you another one which to me seem a little odd, where when they're beginning to consider warnings the American Medical Association said we don't need them.

Everybody knows, warnings went on in 1966, 33 some years ago. They've been there that whole time. Everybody who's picked up a pack of cigarettes in this time has seen them.

He showed you a survey. It wasn't just adults, he showed you a survey of 7th and 8th grade students in Cincinnati, 1966, published in '67, Journal of School Health. 98 percent.

You will see in the Surgeon General's reports, by the way, that will go back with you that the Surgeon General said it's unrealistic to ever get above 90 percent, just can't happen.

98 percent, 7th and 8th graders, right here in Ohio.

Dr. Daniel Horn, we showed you this one, too, as well. First head of what became the Office on Smoking and Health, did one of the first big studies. Stand on a rooftop and shout it's dangerous, and you wouldn't be telling anybody anything they didn't already know. Dr. Daniel Horn.

So what happened as of '64? Well, there was a unique effect. It was not just information as of '64 and thereafter, the public health community, the government, the voluntary organizations, they set about to change behavior, to get people to smoke different kinds of cigarettes, or to quit. And quit was the first choice.

And behavior did change. 50 million people quit smoking since then. Smoking has become less and less a

practice that was expected and more and more of an exception. Smokers became more and more marginalized over the years bit by bit, made to feel uncomfortable about their choice, until today it is tough for anybody, for somebody to relax and enjoy a smoke.

Information about the health risks of smoking became so pervasive that people actually believe that -- when you do a scientific study -- the health risks of smoking to be higher than they are. Remember Dr. Viscusi came in from Harvard for us, and he did this analysis, cut it a number of

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different ways. And plaintiffs asked some questions on cross-examination about, well, you know, the lung cancer surveys, they don't really tell you anything, it may be a proxy for other issues, so I put up the total mortality number.

People perceive more risk than the Surgeon General reports there is risk.

Is this an information deficit, Ladies and Gentlemen? Is this people who need more information about smoking to make these decisions?

He talked about how these statistics were true of the public generally, how they were true of smokers, how they were true of union workers, and how they were true of younger people that he surveyed.

What did Dr. Martin say on these issues in the end? He

said the information that was out there was overwhelmingly negative. He actually looked at a series of articles, remember, the New York Times and Cleveland Plain Dealer, to see how many articles on smoking included comments by the industry.

What was it, 10, 11, 15 percent, somewhere in there? The articles were overwhelmingly negative even when they quote an industry statement.

He said there was no evidence that anything the industry did affected the general state of awareness or union awareness or medical community awareness.

Dr. Scheffman talked about how the industry's information went through the media almost without exception. And Dr. Martin's analysis of those articles is the only one that's here, overwhelmingly negative.

Ladies and Gentlemen, on that point of causation and reliance, you will be urged, I guarantee you, when Mr. Coughlin gets up, we will hear more of this "only one cause," you know, it is not necessarily the only cause.

I'm not belittling his argument. What I'm saying is you have some tough decisions to make here. They can't prove cause, they can't prove reliance. They can't prove that anything these companies did was a cause without which these injuries they allege wouldn't have occurred. They can't meet those standards.

But how about the funds themselves? Let's move away from the individuals, let's talk about the funds.

Plaintiffs put up some testimony from Mr. Garfield, one of the trustees here, just a little bit earlier. They didn't show this one. I want to show you a question and answer from Mr. Garfield: "Do you believe that if the trustees of the fund over the past 30 years knew what they know today about the health consequence of tobacco and the actions of the industry that they would have taken actions such that they would have reduced the medical costs that they paid associated with tobacco? Do you believe that?

"A. Number one, I can't speak for them, okay. I can speak for me. And that's got two edges on that sword, okay. And I can't speak for the other people, but I go back to tell you what I've told you previously on one of these long strips of paper" -- what he's talking about is the court reporter's paper, I'm sure you've noticed it is long strips -- "that it's every man and woman to themselves. They do what they want to do when they want to do it, and I am for the freedoms. And if the freedoms that I believe in are going to cost a little bit more someplace down the line,

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then you make provisions for it, and you don't go around suing people."

That was Mr. Garfield. They showed you another part of his testimony. Remember the chart Dr. Ghilarducci showed

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you? It speaks reams to the very point Mr. Garfield is making. Again, I don't have as good of a copy of plaintiffs' chart, but they showed you this earlier. This was their chart. What could be more clear about absolute lack of causation and reliance? What could be more clear?

This squares with the testimony. We read a few depositions of trustees last Thursday afternoon when we finished, and it's never fun to read depositions, but we put additional depositions in the record that weren't read. They're there for you to look at in the jury room.

I urge you to look at them, because they bear this out exactly. It brings the focus back to the real people making real decisions. They bear this out exactly.

The trustees were making their decisions and their recommendations from their professional advisers. They weren't making recommendations on anything they heard from the tobacco companies. And there is no dispute on that in this record.

Even Professor Proctor testified that reasonable doctors concluded causation back in the '50s, so if they're given this advice through that chain, obviously nothing the tobacco companies says affects that.

You heard Mr. Clarson's testimony read to you last week, not misled in any way. There is an unbridgable gap in the end, unbridgable gap, between those two lines Mr.

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Bernick drew earlier between the alleged wrongful conduct and the decisions of real live people and union trustees. It doesn't get there. No bridge can be built.

So what do they do? They claim addiction, they say, well, you know, this emphasis on decisions, that's really improper. Addiction. Addiction changes the whole mix.

Now, let's look at what it is they're talking about. Remember, we showed you the interrogatory that said addiction, their definition is loss of control of drug use, implying that if one wants to stop it's difficult to do so.

Well, absolute contradiction between loss of control and difficult to stop if you want to. One says you've lost control, one says it's difficult. To be difficult means you have control. All of us do difficult things every day, breaking habits, starting things, whatever.

What does the evidence show on this? Well, not even plaintiffs' experts bought the loss of control argument. You didn't hear any of them say people are powerless to make these decisions. They didn't do it.

The evidence is that people quit smoking in droves, more than a million a year, so many there are now more former smokers in this country as there are smokers.

And some 95 percent of these did so as a matter of personal choice. They didn't need pills, didn't need patches, didn't need halfway houses, didn't need to be

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strapped on a gurney, no detox center.

They just made the decision. I'm not saying it wasn't difficult, it might have been. It surely was for some, but they did it.

Dr. Cloninger was here and testified. He was one of the leading scientists who participated in this, the

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Diagnostic and Statistical Manual. This is the Bible of the American Psychiatric Association, the complete catalogue of mental illness.

And I'll tell you, when you look through here, there is some stuff that will make your hair stand on end.

But with respect to these issues, what did Dr. Cloninger tell us about this? At the very beginning of this it makes it clear that loss of control is not implied here, right at the very beginning.

And Dr. Cloninger talked about how people make choices, what kind of choices they make, and he was totally -- his testimony was not cross-examined on that.

How about the second part, difficult to quit. Well, as I said to you in opening statement, you get no argument on that. We step up to that. It can be difficult to quit. No secret, it's been around forever.

Dr. Martin even told you, from Columbus, Mark Twain, on and on, Henry Ford, the fact it can be difficult to quit is known, and it's no secret.

So what's the squabble? What it really comes down to in some ways is what's the best descriptive term for the behavior? You know, we've got the 1964 Surgeon General's definition, you know, habituation definition; we've got the 1988 Surgeon General's definition, the addiction definition; we've got the DSM definition, which to this day isn't addiction, it is dependence, to this day.

Are we going to squabble about those words? Is that a worthwhile endeavor to analyze whether people can make choices on this or not?

I'm sure you notice that both Dr. Benowitz and Dr. Parran said when they talk to their patients and they're dealing with a cigarette smoke issue do they call them addicts? Huh-uh. When they're dealing with real people they say, you have a problem with your smoking, you might be dependent. They don't call them addicts. They don't call it addiction.

Dr. Benowitz even admitted that addiction is a term that he had said at one time he wouldn't use in front of a jury because it was too loaded, too confusing.

Do you remember that? He also said -- this is most important -- that reasonable people, reasonable people can still disagree about whether or not to use the label of addiction because it is confusing.

He said -- Mr. Bernick showed you in the end its not

important what the label is, the issue is it's hard to quit, and it sure can be.

But two aspects of that behavior are important for you to think about. Dr. Benowitz told you that there is nothing about smoking or nicotine that diminishes in the least the ability of people to understand, to think about, to hear, to read warnings, to make reasonable human willpower decisions about what they want to do.

Dr. Rowell came here from Louisville, and he wanted to talk to you about what does science say about is there a difference between things like nicotine and caffeine and these other drugs, these things we call hard drugs.

Remember Dr. Rowell? Did he show you there was a difference? He sure did.

Remember those bar charts on what the different levels of chemicals that were released with nicotine and caffeine and with amphetamines and the other? Was that a difference

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that made a difference? It sure was, although I'm not sure we needed an expert.

Common sense tells you there is a difference between people who smoke cigarettes and those who stick needles in their arms, and you don't need experts and you don't need lawyers to tell you there is a difference between getting in a car and getting on an airplane with a drunk or a coke head and getting on one with somebody who happens to be a smoker.

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Everybody agrees, smoking can be hard to quit. Everybody agrees, people can do it. Dr. Benowitz agrees the names of the behavior don't matter.

So there is nothing about this whole addiction issue that changes the fundamental mix we've been talking about.

I want to go now to just a few last points. We won't have a chance to speak to you again after plaintiffs' lawyer does, and that's part of the rules in court. I'm not complaining about it. They have the burden of proof. They get to open, they get to close. But I'd ask you for one indulgence as you hear what I'm sure will be a fine presentation by Mr. Coughlin. Think about it critically, and when you go back to the jury room, realize we haven't had a chance to respond, and we won't. Think about whether what you're getting is fair, complete. Think about what questions we might ask, just to make sure it's objective. It's critical that the evidence is examined.

I'd ask you to do that because we won't have a chance to respond, and I'm sure he'll be responding to many things.

Just a very few last points, Ladies and Gentlemen. Courtrooms are filled with symbols. One of the symbols -- we don't have one right in this courtroom, but one of the symbols is that statue of justice, always blindfolded, holding a scale. And the blindfold is what always strikes me, because what that says is that when justice is doing its

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work, it's just weighing the evidence, and it's not looking at the status or the appearance or the whatever of who the litigants are.

All that matters is the weight of the evidence. No preconceived notions: "I like certain kinds of people, not others. I like certain kinds of companies, not others." Or "I don't like companies," whatever.

Justice is blindfolded. All that matters is evidence.

And that's an important symbol for us and for this case, where there are so many political issues, so many things about smoking, where all of you had ideas, notions, thoughts about smoking before you ever got that mailing from the Court saying you might have to come on in and be jurors.

You know, another symbol is the way the jury box is set up with that railing keeping you jurors separate from us. That's because the winds of politics and popularity and unpopularity, they don't affect you.

What the public or the media or people who haven't sat here throughout this whole case, what they think doesn't affect you. You're set apart from all of us, even the Court. That's because you and you alone, out of all the millions of people in Ohio, and there are hundreds of millions in this country, you and you alone have been called in through this random process and bound together by an oath you took and told it is your job, yours alone, to define

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justice in this case, to define what it is; not philosophers, not theorists, not advocates, not anything.

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That's your job.

And what you're about to go into in defining justice for this case in accordance with the law His Honor gives you, what you're about to do is going to take the best each of you has to offer. It's going to take patience, it's going to take listening, it's going to take the time to express your own viewpoints, stand by your own convictions, and listen to what others have to say, and it's going to take courage. It's going to take courage and convictions, courage of thought.

I urge each of you, take your time looking at that evidence. Think about that evidence. Ask those questions about whether it was put fairly before you.

I thank you here at the end for all the fairness you've shown us, for all the cooperation, all the attention, and with full confidence in how you will do fine justice in this case for all of us.

I thank you and ask that you find for the defendants in each and every respect. Thank you very much.

Thank you, Your Honor.

THE COURT: Mr. Coughlin?

MR. COUGHLIN: There is an old trial trick that good attorneys know, and Mr. Weber and these gentlemen here

are some of the finest attorneys in the country. They're the best, if not the -- they're not the best money can buy, they're the best. They're the best. That's why they're here. They are some of the best attorneys in this country.

And Mr. Weber got up here and said, well, were they fair when they showed you this document or were they fair when they showed you that? And what happened? What was he trying to do?

When the facts are bad for you, you put the other people on trial, and that's what he tried to do.

He did it fairly, I think he did it fairly, because you know that's what his client has been trying to do for all these years. His client has been saying, it's the smokers' fault. Everybody knew, it's the smokers' fault, and you heard it in here today.

How can it be if it's the smokers' fault that the CEOs go in and raise their hand? How can it be that they say that they don't know? How can it be that they could still have that defense?

And who are these people here? Who are my clients? Are they not real people? You saw Gary Adams get up and talk to you. Is he not a real person? Is he not a real person in here in Ohio talking about how the trust funds operate?

And Mike Murphy, I saw him get up and leave when I

think he knew I was going to have to stand back up and talk.

Those are real people, you know? Those were real people here that came in and talked to you about how the funds operate.

And what do they want to do? They want to put somebody else on trial.

It's a straw man. They want to put somebody else on trial. They want to put the smoker on trial. Why? Because these health funds suffered real damage here.

Mr. Weber pulled up a document and said, was that fair to Mrs. Beasley? You heard Mrs. Beasley when I asked her about that document. I put the document on the screen and asked her about that, "Was that a Joe Camel document." I

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had sent that document to her the night before. She'd looked at it the night before. Once she told me on direct it was not, we moved on.

It almost screwed up his whole comeback at the end to try to accuse me of somehow misleading her, because they knew we had gotten that document as one page like that.

That was the end of that question. That was the end of that question.

You know, as to her with that document, that had nothing to do with anything. It was a smoke screen, because the facts here are hard to get away from.

They can't get away from these documents. They can't

get away from them because these aren't just like a memo that just happens to be generated. It is not an invoice. These memos are directional memos from the top people in these companies.

Mr. Long got up and said, well, you haven't seen much from Lorillard, you've only seen -- he held up nine documents.

Well, that's missing the whole point of this case. This case is about these companies, come to be sure. No doubt about it. But what it's really about is the enterprise that they operated through. That's what the problem is here. That's what created the problem.

All the statements that the TIRC and the CTR made and the TI, and how it was interfaced with Hill & Knowlton, all of those statements, they're their statements. They were on the board of directors. They control those entities. And they had to be legal entities to do what they needed to do to protect themselves.

And they did some good work, no doubt about it. But it operated as a fraud, as a fraud on these health funds, because you're right, somebody had the ear of the medical community, and it was the people working at the SAB.

Opinion polls: They keep coming in and talking about how everybody knew in the opinion polls, and they showed these opinion polls. Why do these companies, if that's

true, why do they keep issuing those statements throughout the years? All the statements about what it is and what it's not. Why do they keep challenging and stepping out and challenging the Surgeon General and others?

There's a reason. There's a reason these companies spend nearly $6 billion a year in advertising and promotion.

Why? Because they have to keep that debate open. It not only affects the children, it also affects people that are continuing to smoke and trying to quit.

And you heard from the stand the person who would know the most, Dr. Parran. He testified that those mixed messages that people received when they're addicted to something are simply deadly. That's what the person who takes care of these people -- that's what he testified to.

So it's time for somebody to take responsibility for their own actions, that's right. And those people are the tobacco industry defendants that are sitting here before you. They made the choices, they made the choices to set up these organizations to move forward, and so they should answer those choices today in front of you and as you go back to deliberate.

I want to go over this jury form with you for a second, because it can be very confusing, but I want to answer a couple more things that were brought up.

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The defendants said that they brought in, defense

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counsel said they brought in people to explain the documents. That's not true. The people that they brought in did not explain those documents.

Mr. Morgan came in, and he essentially said, hey, he saw those documents in litigation. That's what Lynn Beasley said.

The people they brought in, Lynn Beasley didn't get on that campaign, she said, until she started it back up right before 1988.

Well, what happened in '85 and '86 and '87 when the funny French Camel promotional items were going on here in this country? Why did they keep trying to get away from '85, '86, those numbers. They keep saying there must be something wrong with Dr. Pierce's numbers.

Look at this jump in '85, '86 and '87. That's right, there's a jump there, because that's when the Joe Camel promotional gear came over here from France, the funny French Camel, and it was a predecessor to the Joe Camel campaign.

And that takes off in '88, and you get that, and what happens in '88 to '92? There is a jump in the promotional items. The Camel cash comes in, and you get another jump.

They can't get away from those facts of the rise in teen smoking. But what do they do? They throw all these ads up here about "Meet the Turk". You see, that didn't do

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anything, that didn't do anything. And he says the proof is in the pudding. The proof is in the pudding.

You see, that didn't do anything, but he doesn't say that about the Joe Camel campaign, because that's not what happened with that campaign.

They looked at kids, they knew they need them to survive and prosper, and they targeted them. They went after them.

Philip Morris did the same thing. You saw documents in every one of these defendants, what they were doing, and you know what? They all knew what they were doing. The only company that didn't seem to go after children the same way was American. That's right.

You look through these documents, and there are very few American documents that have that about the children and what's going on with them.

And you know what? They were at the top. I believe that it was Mr. Hahn who called everybody else together, no doubt as they set up this thing to operate the TIRC that they were involved in that, they were involved from the very get-go, from the beginning of it. But you don't see many children stats and what happens to that market share as it comes down over the years. That's what happens to a brand as market share rose.

Let me just touch on this verdict form for a minute.

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You're going to get to take this back with you, and I want to explain to you, this first part asks about mail fraud, and it goes through, and you've got to figure out whether the defendants engaged in a scheme as to every one of these companies here, and you mark it down and you read the instruction carefully.

And as everybody else said, if anything I said right now differs from what the Court instructs you, I apologize, and it's what the Court instructs you obviously that

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controls.

And you take a look at each of the defendants, and you make a decision whether they engaged in a scheme, and we submit that they did, Ladies and Gentlemen. We submit that by participating with TIRC and CTR through TI that they control the statements these people issued. Okay?

So the mailings that occurred out of here, the cigarette samples, the promotional items, the ads and the letters that these companies sent throughout the years, satisfied further mailings, and that's literally hundreds of thousands.

The real decision is not whether there were mailings; there were mailings: All these documents, all the ads, everything else. The decision is, were these companies that you have to make a decision to, were they involved in the scheme.

So Philip Morris, were they involved in the scheme. R.J. Reynolds, were they involved in a scheme that operated to defraud the health funds. And we'd submit that as to the six named representative health funds that they were.

And as you go through you answer, yes or no, however that you're going to do it back there, either a yes, the foreman or foreperson, forewoman, will write down yes or no throughout each one, it doesn't have to be unanimous. You can find one company did not participate in a mail fraud or one company did not participate in the wire fraud, or one company you feel they weren't involved necessarily in the obstruction of justice, the concealment, or that another company wasn't involved with any tampering.

But I would submit to you, Ladies and Gentlemen, that they all were, not only through their joint activities with each other, but they all knew what was going on with each other because of the TIRC and CTR, and the Hill & Knowlton and the TI, the Tobacco Institute.

It's that common bond that draws all of them together in something that they controlled through this enterprise. And as a result of that control, it's not only their own activities, it's not only where you have Osdene taking the Fifth and that note about destroying documents, and Farrone coming in and confirming that, or that telex that they're trying to get away desperately that goes, you know, across

the seas from BAT over to B&W; it's not only those things, but it's also what this group here did. And you know what's going on with the special projects and what was concealed. And so the wire fraud is use of the phones.

Hundreds of press releases, you'll see them throughout the documents, the press releases. They talked about official proceedings. They talked about official proceedings here in Ohio.

I would submit to you that there are, first of all, no requirement that the proceeding be here in Ohio, that it has to impact Ohio, that that's what the proceeding is all about; that it can be the Surgeon General's, it can be the FDA, it can be Congressional testimony. And you saw what these people were doing through the special projects here.

But I would also submit to you it did impact proceedings here in Ohio as Ohioans made decisions about what to do with smoking and health throughout the years. And part of this scheme not only involved deceiving the federal government, but also state and local legislatures, and I think that came through clear and is in the documents.

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They not only have this organization set up here as we talk about it, whether it was feasible or not, but they also have an international organization, ICOSI.

They talked -- they had a person come in and said it wasn't feasible because the rest of the world was not

involved, quote, in the scheme. But think about these three things: One, these companies, as they've admitted themselves, were light-years ahead of the other companies in the rest of the world; number two, they're the biggest companies in the world. Philip Morris, quote, leads the way. Three, the person that they had come in to testify to that knew nothing about the R&D, research and development, expenditures for their companies that he said supposedly could overcome the barriers of entry into this country.

And I guess I went over three, and the fourth one is that he couldn't even tell you what brands were in these countries that he said these companies would become involved.

And finally, he had to admit there was this international organization, ICOSI, in which these same companies, companies that were in seven or more countries, had gotten together to form another organization.

I don't know if that organization -- and we're not making that claim -- is the same as this TIRC, CTR and TI, but it is an organization in which the companies in the rest of the world have gotten together.

So after you go through the mail fraud and each defendant that you've answered yes here, you have to answer yes down here to see whether that defendants committed mail fraud, beneficiaries reasonably relied; predicate acts; it

has to go through a pattern. It cannot only be -- it can be one mailing and then one obstruction of justice charge or one tampering and one mailing, but they have to interrelate.

And there is kind of a catch here, that in Ohio, and it was in the Judge's instructions, that it can't just be the mail and wire fraud, which is the more common, the scheme things. There has to be a predicate act found for these companies aside from the mail and wire fraud.

So if you proceed to part two and you find wire fraud, yes, the press releases issued by these companies and through the CTR and through other entities, that they controlled and were agents, that they were operated as a fraud on the funds, and you answered yes here to all of these, and you go on and answer yes here, and then you get to tampering, which is a separate predicate act and has separate instructions, and you've got to look at each instruction because they are a little different.

Tampering and obstruction of justice are closely related, but they're sufficiently different and have different elements.

One, the tampering requires a proceeding, and the obstruction of justice has a concealment aspect to it and assisting another in a crime.

And I would submit all of these companies joined together to assist each other to shift these costs, and

that's what it really was. They shifted these costs onto the health funds when they should have taken the responsibility or made the announcements early in '54, and as a result of their actions, beneficiaries started smoking earlier, and the health funds were damaged and suffered

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damage throughout the years.

And as you get through the tampering, which has two questions to each, you have obstruction of justice, the same two questions there. As to each company, you have to make a finding.

And now we get to part five, which is the corrupt activity act. Now, this is essentially what the charge is. What we allege is that this group of companies, because it was plausible and they had a motivation, gathered together and formed a group or joined together and worked through an enterprise, and that's what this TIRC, CTR, H&K and TI are, and that's what the instruction will say to you.

And if you find they did join -- and we know they did -- if you take a look at the evidence, you see they all joined in the early '50s, that they joined together and that they operated in such a manner as to exert control over the CTR and the TI.

And you saw those documents, how they did exert that control that they set on the board of directors, that they controlled the lawyers, that controlled those groups; and

TI, according to at least several documents, was just a spokesman for those lawyers.

If you find that control, then you find that they -- then you can find and put yes as to each of these companies, that they violated the Corrupt Activity Act.

And then you answer those two questions there, and you go to a third question now. And this is the question whether that activity -- and what Mr. Weber and Mr. Rowe were talking about -- caused the damage to the funds. And you get down here and you have the specific funds here that are referenced here, and they're the representative funds in this case. They're the funds that brought the action on behalf of the class.

And in this, and at this time you're not being asked the amount of any damage. All you're being asked to do is to decide whether they were substantial cause in the damage that these funds suffer, and we would submit to you that we presented enough evidence and sufficient evidence that over the years that they undertook these activities that they did operate as a fraud and did cause damage to these funds.

And you go on, and decide that same thing as to a conspiracy claim for the corrupt practice act, and then you get down to the final charge here, which is the civil conspiracy charge.

And you have to make that finding as to whether -- it's

just a little different, it's not the same joining. It can be an agreement, a tacit agreement. For the last charge you don't need the enterprise. You don't need the active participation in the TIRC or Hill & Knowlton, or anything else, you just have to find that there was a tacit agreement that operated and that they worked together and operated as a fraud on the funds.

Thank you very much, Ladies and Gentlemen, for your time in the last several weeks. We appreciate your attentiveness and stick-to-it-tiveness, and sometimes coming in when you're sick and making it here when it was snowing, and this is an important case for both sides, and we appreciate the seriousness of the case, and what you bring to it, and that you'll consider the evidence as it came in in this case and consider it in a fair light.

Thank you very much.

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THE COURT: Now it is proper to add the caution that nothing said in these instructions and nothing in the verdict forms prepared for your convenience are meant to suggest or convey in any way or any manner any intimation of what the verdict I think you should find.

What the verdict shall be is your sole and exclusive duty and responsibility.

Now, if it becomes necessary during your deliberations to communicate with the Court, you may send a note by the

deputy clerk, signed by your foreperson or by one or more of your members.

No member of the jury should ever attempt to communicate with the Court by any means other than through a signed writing, and the Court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing or orally here in open court.

I would note from the oath that the bailiff are forbidden to communicate with you, the bailiff or the deputy clerk, in any way or manner on any subject touching upon the merits of the case.

Bear in mind also that you are never to reveal to any person, not even to the Court, how the jury stands numerically or otherwise on any question before you until after you've reached a unanimous verdict.

Let me also give you an additional caution. You are going to be taking and beginning deliberations. You're only to deliberate and discuss this case when all 11 of you are present in the jury room and able to hear the comments, observations, and thoughts of the other jurors. So if at any time not all 11 of you are present in the jury room, cease your deliberations until all of you are present and able to hear the thoughts of the fellow jurors.

Your verdict must represent the considered judgment of

each juror. In order to return a verdict it's necessary that each juror agree thereto. In other words, your verdict must be unanimous.

This is also true with regard to the responses to the interrogatories. As to each response, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment.

Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence in the case with your fellow jurors.

In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced that it is erroneous, but do not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are not partisans. You are judges, judges of the fact. Your sole interest is to seek the truth from the evidence in the case.

Now, upon retiring to the jury room you will first select one of your number to act as your foreperson, who will preside over your deliberations and will be your spokesperson here in court.

When you have reached the unanimous agreement as to

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your verdict you will have your foreperson fill in, date, and sign the form which sets forth the verdict upon which you have unanimously agreed. Each of you, of course, must sign the verdict.

It's proper to add the caution that nothing said in these instructions is meant to suggest or convey in any way or any manner any intimation as to what the verdict is I think you should find.

What the verdict shall be is the sole and exclusive duty and responsibility of the jury.

You will take with you a copy of the instructions for your assistance. It's my hope that these answer any questions you have as the law I instruct you on.

You will leave all of the interrogatories on your seat. So leave your copies of the interrogatories on your seat, and a separate copy will be sent in to you.

I caution you again, that with regard to any message you might send that you should never state or specify any numerical division at that time.

I would ask counsel to just finally approach for a second.

(Discussion at side-bar on the record:)

THE COURT: Does counsel for the plaintiff think there is anything else that needs to be dealt with?

MR. COUGHLIN: No, Your Honor.

THE COURT: Anything from the defendants?

MR. WEBER: No, Your Honor.

THE COURT: Thank you.

(Proceedings in courtroom in the presence of the Jury.)

THE COURT: Now, the courtroom deputy will now escort the jury to the jury room, taking to them the Court's charge, which you already have.

The interrogatories will come to you in a few minutes. The verdict forms will come to you in a few minutes. The exhibits will be brought to you in a number of minutes, as well, so those will all be sent to you.

We're going to stand in recess. Let me give you one caution. At some point you may during the course of your deliberations wish to take a recess. If you have any such feelings, communicate that to the deputy clerk.

Also, I again caution you as to any time when you're not deliberating, you're absolutely not to say anything to anyone about the status of the case or the nature of your deliberations.

Now, after the case is over you can talk about it to your heart's delight, but especially now, don't say anything to anybody until a verdict has been reached.

So finally, take the note pads with you, and again, leave the interrogatories on your seat.

We'll stand in recess at this time.

(The jury retired to deliberate.)

(Proceedings in courtroom out of the presence of the jury:)

THE COURT: I'd ask counsel to come forward and examine the verdict form and the interrogatories, and bring to the Court's attention any questions you have concerning it.

I just would finally caution counsel that before the exhibits go back, both sides need to insure that only exhibits that are properly sent back to the jury are included in these that go to the jury.

So if there is any questions, bring it to my attention,

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but if I do not hear anything on that issue, I'll understand that you've examined the exhibits and only the proper ones have been forwarded to the jury.

MR. BERNICK: When is your intent to send them back?

THE COURT: I usually will be guided by their sentiment. If they desire to stay a little bit later we'll stay. If they desire to recess for today, I'll likely do that after a certain period of time.

MR. WEBER: Judge, could I ask you, different Courts do it differently, how late do they -- is that purely up to them or --

THE COURT: Not purely, but -- so my tendency

would be that if they're here at sometime after 6:00 that it would be likely that I might well send them home.

MR. WEBER: And they would come back at --

THE COURT: 8:00. So we'll stand in adjournment.

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4:15 P.M.

THE COURT: We would note we have a request from the jury for a break. I assume no one cares.

What I'm going to do, I'll send them, tell them 15 minutes, and then I'll ask the deputy clerk to stay with them, and then unless there is some request, I'll just return them directly to the jury room.

MR. COUGHLIN: No. We could put the boxes in the jury room if they're going out so Vickie doesn't have to carry them back.

THE COURT: Are the exhibits ready to go though?

MR. COUGHLIN: Yes.

THE COURT: Why don't you tell them we'll do that while they're gone.

THE CLERK: They're going along when you first look in the left-hand side, I emptied the whole row there.

THE COURT: Do you want to keep this, Vickie?

THE CLERK: Yes. Could you take the flip chart in, also?

THE COURT: Wait until they go out.

THE CLERK: I'll let you know.

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4:50 P.M.

THE COURT: We have another communication from the jury. The communication reads, is the jury permitted to take the jury instructions home with us to review? Can we recess at 5:00 p.m.?

So I think the answer would likely be no and yes.

MR. COUGHLIN: That's fine, Your Honor.

MR. WEBER: No objection.

THE COURT: Although the only question I would say to you is, do you know if this -- they probably haven't said -- I'm going to respond to the jury as that if the jury wishes to respond or to recess until tomorrow, because I'm just wondering whether this is their actual sentiment that they want to recess now, or he's just asking generally whether they have a right to ask to recess.

I'm going to respond to the jury, if the jury wants to recess at 5:00, advise the deputy clerk. No, you cannot take the instructions home.

And can you just get a response from them?

THE CLERK: Sure.

THE COURT: Here is a proposal in terms of the

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interrogatories, if you want to have somebody come up.
MR. WEBER: I have my lawyer here, Judge.

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(Discussion off the record.)
THE COURT: Can we just go on the record.
I've shared with the parties the proposed revised corrupt activity interrogatories, and I've changed -- or I've added an additional interrogatory number two dealing with the conspiracy allegation in the corrupt activity claim.
And the parties have reviewed this, and without objection I'm going to send it back to the jury.
I'll print off just one more copy.
MR. JONES: We would just note we had an objection to the instruction upon which it was based, but we don't have an objection to the interrogatory in light of the instruction.
THE COURT: Okay. They're indicating they want to recess, and they've indicated that juror number 4 is foreman.
So I'll tell them that they can leave, that they can return at 8:00 a.m. tomorrow morning, and that -- well, is everyone here? I typically deal with this by way of written communications, but since everyone is here I may bring them into the courtroom and just remind them again of their oaths.
MR. COUGHLIN: Okay.
THE COURT: Why don't you bring them in.

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(Proceedings in courtroom in the presence of the Jury.)
THE COURT: Have a seat. We're going to recess for the night.
I did want to caution you again just that you are not allowed to talk about the case with anyone. You're probably going to get some questions at home or by friends, and say you absolutely can't talk about the case whatever, that it would be very improper for you to do so.
I recommend typically to jurors that they try to give themselves overnight seasons like this some distance from the case.
I think it is sometimes better to put the case behind and wait until you return tomorrow morning to able to hear the comments of the other jurors, and their observations on the evidence before you form, reach or express any conclusions.
Attendance is also very much mandatory. You've all invested an awful lot of time in this case, and so it's more important than ever that you make sure that you're here by 8:00 tomorrow.
So with those thoughts to you and those directions, we're going to stand in recess.
The deputy clerk will help you get out of the building. Again, don't let anybody talk about the case in your presence or near you. Okay? So be very mindful of

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those instructions.
We'll stand in recess.
(The jury exited the courtroom.)
THE COURT: The parties were able to review the verdict forms, I understand, and there was no question about that?
MR. COUGHLIN: No, Your Honor.
MR. WEBER: The verdict form, Jeff?

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MR. JONES: Right.
THE COURT: It was only -- okay. I'll prepare that interrogatory or print a fresh copy, and then we'll send it back to them tomorrow.
MR. WEBER: Judge, what does -- just a quick question.
THE COURT: Off the record.
(Discussion off the record.)
(Proceedings adjourned.)

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C E R T I F I C A T E

We certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Heidi Blueskye Geizer, RMR, CRR Date

Richard G. DelMonico Date

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